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Supreme Court of the United States

OCTOBER TERM, 1948

No. 52 52

INGRAM M. STAINBACK, GOVERNOR OF THE TERRITORY OF HAWAII, WALTER D. ACKERMAN, JR., ATTORNEY GENERAL OF THE TERRITORY OF HAWAII, AND W. H. LOPER, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE TERRITORY OF HAWAII, APPELLANTS,

vs.

MO HOCK KE LOK PO, AN ELEEMOSYNARY CORPORATION, DAI KUNG CHINESE SCHOOL, AN ELEEMOSYNARY CORPORATION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII

FILED MAY 7, 1948.

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Mo Hock Ke Lok Po, an Eleemosynary Corporation, Dai Kung Chinese School, an Eleemosynary Corporation, and Chung Shan Chinese School Association, an Eleemosynary Corporation, Plaintiffs,

vs.

Ingram M. Stainback, Walter D. Ackerman, Jr., and W. H. Loper, Defendants

Civil No. 765

Clerk's Statement

Time of Commencing Suit:
November 22, 1946. Complaint filed.

Names of Original Parties:
Mo Hock Ke Lok Po, Dai Kung Chinese School, and Chung Shan Chinese School Association, Plaintiffs.
Ingram M. Stainback, C. Nils Tavares, and W. H. Loper, Defendants.

Dates of Filing Pleadings:
December 11, 1946. Stipulation and Order.
December 13, 1946. Motion for Allowance of Preliminary Injunction etc.
December 23, 1946. Answer and Exhibits A and B.
Defendants' Objections to Allowance of Preliminary Injunction and Affidavits.
January 28, 1947. Order Denying Preliminary Injunction.

[fol. 3] Dates of Filing Pleadings: (continued)
February 14, 1947. Motion to Set for Hearing the "Defenses in Law" of Defendants and Order Setting Date of Hearing.
Motion to Dismiss and Notice.
February 24, 1947. Supplemental Pleading.

February 24, 1947. Motion to Strike Plaintiffs' Supplemental Pleading.

June 26, 1947. Amended Complaint.

July 30, 1947. Answer to Amended Complaint and Exhibits A and B.

August 16, 1947. Stipulation.

October 22, 1947. Opinion of the Court. Opinion of the Court re Applicability of Section 266 Judicial Code of the United States. Dissenting Opinion of Denman, Circuit Judge.

December 4, 1947. Stipulation of Facts. Amendment to Amended Complaint.

January 19, 1948. Stipulation and Order.

January 24, 1948. Findings of Fact and Conclusions of Law. Judgment.

February 11, 1948. Amended Findings of Fact and Conclusions of Law. Amended Judgment.

Times When Proceedings Were Had:

January 28, 1947. Denial of Preliminary Injunction and Disqualification.

February 26, 1947. Hearing Motion to Dismiss and Matter of Equitable Relief.

February 28, 1947. Memoranda ordered to be Submitted and Continued for Setting.

March 7, 1947. Further continuance for Setting and Hearing on Matter of Court of Three Judges.

[fol. 4] Times When Proceedings Were Had: (continued)

March 14, 1947. Further Hearing on Matter of Three-Judge Court and Continued.

June 20, 1947. Hearing Matter of Jurisdiction by Three-Judge Court and Continued.

June 23, 1947. Decision on Jurisdiction by Three-Judge Court and Set for Trial.

June 26, 1947. Trial.

June 27, 1947. Further Trial.

June 28, 1947. Further Trial.

June 30, 1947. Further Trial.

July 1, 1947. Further Trial and Case Taken under Advisement.

Proceedings in the above entitled matters were had before the Honorable J. Frank McLaughlin, Judge, United States District Court, District of Hawaii, (later disqualified); the Honorable D. E. Metzger, Judge, United States

District Court, District of Hawaii; and the Honorable William Denman, Judge, United States Circuit Court for the Ninth Judicial Circuit, the Honorable Paul J. McCormick, Judge, United States District Court for the Southern District of California, and the Honorable D. E. Metzger, Judge, United States District Court for the District of Hawaii, sitting as a Three-Judge Court.

Dates of Filing Appeal Documents:

March 31, 1948. Petition for Appeal.

April 16, 1948. Assignment of Errors. Bond on Appeal. Order Allowing Appeal. Citation on Appeal. Acknowledgment of Service of Citation. Acknowledgment of Service of Petition for Appeal, etc.

[fol. 5] Dates of Filing Appeal Documents: (continued)

April 16, 1948. Praecipe on Record for Appeal.

April 20, 1948. Plaintiffs' and Appellees' Designation of Additional Portions of Record.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 6] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII

Civil Action

Civil No. 765

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, and CHUNG SHAN CHINESE SCHOOL ASSOCIATION, an Eleemosynary Corporation, Plaintiffs,

vs.

INGRAM M. STAINBACK, NILS C. TAVARES, and W. H. LOPER, Defendants

PLAINTIFFS' BILL OF COMPLAINT—Filed November 22, 1946

[fol. 7] To the Honorable, the Presiding Judges of the United — District Court in and for the District and Territory of Hawaii:

Come now the plaintiffs above named, and complaining of Ingram M. Stainback, Governor of the Territory of

Hawaii, Nils C. Tavares, Attorney General of the Territory of Hawaii, and W. H. Loper, Superintendent of Public Instruction of the Territory of Hawaii, defendants above named, respectfully show unto Your Honors as follows:

I

That the defendant, Ingram M. Stainback, is the duly appointed, qualified and acting Governor of the Territory of Hawaii; that the defendant, Nils C. Tavares, is the duly appointed, qualified and acting Attorney General of the Territory of Hawaii; and the defendant, W. H. Loper, is the duly appointed, qualified and acting Superintendent of Public Instruction of the Territory of Hawaii and as [fol. 8] such Superintendent is the executive officer of the Department of Public Instruction of the Territory of Hawaii. That each of said defendants is a resident and citizen of the Territory of Hawaii.

II

That the plaintiffs are eleemosynary corporations incorporated under the laws of the Territory of Hawaii; that the teachers in said schools and the parents of children who were attending said schools are residents of the Territory of Hawaii and some are citizens of the Republic of China. That the plaintiffs were incorporated for the sole purpose of conducting schools for the education of children in the Chinese language and they have been conducting same long prior to the enactment of the Law of 1943 as hereinafter referred to and they are now prepared to resume conducting of said schools, as they were closed during the last World War.

III

That this is a suit of a civil nature in equity arising under the Constitution and Laws of the United States of America. The matter in controversy exceeds the sum of Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

IV

That there are, at this time, in the Territory of Hawaii eight Chinese Schools, five of which are voluntary unincorporated associations similarly situated to said plaintiffs; that said schools are owned and conducted by more than

three thousand (3,000) persons; that the property belonging to said schools and used and employed in the conduct [fol. 9] thereof exceeds in value the sum of Two Hundred Thousand Dollars ($200,000.00); that the property of plaintiffs and the property of said other schools have all been acquired and said schools have been and are being maintained and supported entirely by private funds paid, contributed and/or raised by the members of said schools; that there were about fifty teachers employed in giving instruction therein; that in the elementary grades of the schools conducted by plaintiffs and of said other schools throughout the Territory the instruction was confined to the teaching of the Chinese language and the various methods of writing the same. That in said grades of said schools, they did not teach anything which is unAmerican or contrary to the ideals of democracy, but on the other hand the teaching in said schools inculcated, and was intended to inculcate, in the minds of the pupils who were attending the same, a respect of the institutions and laws of the United States of America.

V

That this petition is filed by the said plaintiffs on their own behalf and on behalf of the other owners of said schools; on behalf of the teachers who were employed in said schools, on behalf of the parents of the children who were attending and will attend said schools, and on behalf of all other Chinese language schools similar-y situated, who may come in and share the costs of these proceedings.

VI

That plaintiff, Mo Hock Ke Lok Po, is an incorporated association operating the Chinese school known as Mun Lun Chinese School which was founded in 1907; that there [fol. 10] are 38 members of said incorporated association; that said incorporated association did employ 27 teachers prior to December 7, 1941, and since said date and up to April, 1946, the school closed and permitted its premises to be occupied temporarily by the United States Army as offices; that there were 1100 pupils attending said school of whom 160 were in the first grade and 150 were in the second grade; that the said incorporated association is the owner of property worth $100,000.00.

VII

That the plaintiff, Dai Kung Chinese School, was founded in the year 1926 and was duly incorporated on August 28, 1935, under the laws of the Territory of Hawaii as an eleemosynary corporation; that said corporation did employ 2 teachers prior to December 7, 1941, and since said date up to the present time the school was closed; that prior to December 7, 1941, there were 100 students attending said school; and that said corporation is the owner of property worth about $10,000.00.

VIII

That the plaintiff, Chung Shan Chinese School Association was founded in the year 1911 and was duly incorporated under the laws of the Territory of Hawaii as an eleemosynary corporation in 1920; that prior to December 7, 1941, and up to October, 1946, the school premises owned by said plaintiff was occupied by the United States Army; that prior to December 7, 1941, there were 850 students attending said school of whom 120 were in the first [fol. 11] grade and 120 were in the second grade; that the said corporation is the owner of property worth about $85,000.00.

IX

That during the regular session of the Legislature of the Territory of Hawaii held in the year 1943, there was passed an act designated "Act 104" duly approved on the 1st day of May, 1943, entitled "An act regulating the teaching of languages to children"; that the said Act of 1943 is embodied in the Revised Laws of Hawaii of 1945 as Chapter 31. That a copy of the Act of 1943 is hereto attached, marked Exhibit "A" and which plaintiffs pray may be made a part of this, their Bill.

X

That plaintiffs with the five unincorporated associations conduct schools for the education of children in the Chinese language and employ teachers for that purpose, as aforesaid; and that plaintiffs and said unincorporated associations did exercise and perform administration powers in reference to said schools and that many of the teachers engaged therein are unable to read, write and speak the

English language, and are unable to secure the certificate referred to in Sections 1874 of the Revised Laws of 1945.

XI

That there are about 100 foreign language schools in the Territory affected by the said foreign language school act; that of said schools 8 are conducted in the Chinese language and the remainder of said schools are conducted in the Japanese language and that all of said foreign language schools are conducted and attended solely by persons of the Chinese and Japanese races.

[fol. 12].

XII

That in the conduct of said schools by plaintiffs the hours of attendance thereat are so arranged as not to interfere with the attendance by the pupils therein of school age at the government schools of the said Territory but on the contrary the pupils who attend said schools conducted by plaintiffs are urged and required to attend the said government schools in their respective communities and said pupils do attend said government schools throughout said terms thereof.

That in said government schools the Chinese language is not taught to the pupils thereof nor are the teachers teaching in said schools qualified to teach said language.

XIII

That the plaintiffs corporations are required to perform administrative duties with respect to the same; that is to say, they are required to procure suitable buildings and sanitary surroundings, to hire teachers and janitors and other servants, to collect moneys for the support and maintenance of said schools, to collect fees from the parents of children attending said schools, and, generally, to attend to the business matters connected with said schools.

That in performing the administrative duties, as aforesaid, plaintiffs almost exclusively deal with persons who speak the Chinese language.

XIV

That said Act is violative of the rights of the plaintiffs under the Constitution of the United States in that it denies

to them the equal protection of the laws and deprive them [fol. 13] of liberty and property without due processes of law, which is guaranteed by Section 1 of the 14th amendment of the said Constitution of all persons submitting themselves to the jurisdiction of the United States whether citizens or aliens.

XV

That said Act is violative of the rights of plaintiffs under the Constitution of the United States in that it deprives them of liberty and property without due process of law as guaranteed by the 5th amendment of said Constitution.

XVI

That said Act is invalid for the further reason that it is unreasonable, arbitrary, oppressive, capricious, in equitable, confiscatory, discriminatory and unjust and made to depend on a difference of race.

XVII

That said Act is invalid for the reason that under the provisions thereof power and authority is delegated to any supervising principal or other duly authorized representative of the Department of Public Instruction of the Territory of Hawaii to determine what act shall or shall not constitute a violation of Chapter 31 of the Revised Laws of Hawaii 1945, subject to equity proceedings in the Circuit Courts of the Territory of Hawaii to enjoin the performance of any acts or practice forbidden by said Chapter 31 or to require such school or person to comply with the requirements of said Chapter 31.

XVIII

That plaintiffs are informed and believe and, upon such information and belief, allege that the defendants above [fol. 14] named are by law expressly charged with the duty of enforcing the terms and provisions of said Chapter 31 of the Revised Laws of Hawaii 1945, and are vested with power and charged with the duty of restraining by injunction for the violation denounced therein as provided by said Chapter 31.

XIX

That plaintiffs are informed and believe and upon such information and belief allege that unless the enforcement of said invalid and unconstitutional statute is restrained, the defendants will prevent plaintiffs from reopening and conducting the said schools belonging to and conducted by these plaintiffs and will file injunctions and institute actions against said plaintiffs and thereby deprive said plaintiffs of their right of engaging freely in a legal, proper and wholesome vocation, business and enterprise as authorized by law, and will deprive the parents of the children attending the schools of plaintiffs of the right to have their children taught the language of their ancestors.

XX

That if said plaintiffs should be compelled to comply with the terms and provisions of said Chapter 31 of the Revised Laws of Hawaii 1945, and the same should be enforced against them, their valuable property would be depreciated, their staff of skilled and experienced teachers would be disorganized, all to their great and irreparable injury, and to the great and irreparable injury of said plaintiffs, the teachers employed in teaching said schools, and [fol. 15] the parents of children who were attending said schools, and said damage and injury would be incapable of being admeasured and adjudicated in an action at law; and plaintiffs further allege that if plaintiffs are prevented from the free use, in connection with the conduct of their schools, of the aforesaid property, or if the officers, employees or teachers of plaintiffs are restrained by injunction or otherwise harassed by legal proceedings for alleged violation of the provisions of said Chapter 31, such interference, restraints, or other proceedings would immediately involve them in a multiplicity of suits and legal proceedings and would, long before any judgment or decision could be had in such suits and proceedings, compel them to cease the conduct of said schools to their great damage and irreparable injury.

XXI

That plaintiffs further allege that unless restrained by this honorable Court, the said defendants intend to and

will enforce and file against plaintiffs, their officers, agents, servants, employees and teachers, the various equity and injunctive proceedings and suits purported to be authorized or required by said Chapter 31 of the Revised Laws of Hawaii 1945; and that such action on the part of the defendants will necessarily and inevitably involve the plaintiffs, their officers, agents, servants, employees and teachers in a multiplicity of legal proceedings and involve and threaten the plaintiffs with injunctive proceedings and dispersion of their officers and their staff of skilled, experienced and trained teachers, or force them to quit the employ of said plaintiffs in order to avoid embarrassment of having injunctive suits [fol. 16] filed against them and the outlay of legal and other expenses to defend same, and other harassment under cover of legal proceedings, and threaten and involve the destruction of the business of conducting said schools, to the irreparable damage of said plaintiffs and that all and singular the damages resulting from said Act and proceedings would be incapable of admeasurement and adjudication at law.

XXII

That plaintiffs are without adequate remedy at law in the premises and only in a suit of this nature and by the injunctive process of this Court can they be fully protected in the enjoyment of their property and rights as aforesaid; the granting of the injunctive process as hereinafter prayed would prevent a multiplicity of suits and prosecutions and the questions herein involved can be adequately determined only in a suit of this nature.

In Consideration Whereof, Plaintiffs Pray:

1. That a subpoena issue out of this honorable Court citing the said defendants and each of them to appear and answer this, their bill of complaint, answer under oath being hereby expressly waived.

2. That the said statute (Exhibit "A") be declared null and void.

3. That said defendants and each of them, their deputies, assistants and subordinates, and each and every one of them be enjoined and restrained from in any manner enforcing or attending to enforce or causing to be enforced against plaintiffs, their officers, agents, servants, employees and teachers, or any of them, any of the provisions provided

in by said statute (Exhibit "A") and from filing or bring-
[fol. 17] ing any proceeding in equity or causing to be filed and/or brought any proceeding in equity against the plaintiffs, their officers, agents, servants, employees and teachers, or any of them, for or on account of any alleged violation by them of the terms and provisions of said statute and from in any manner and to any extent, interferring with the property, business and affairs of plaintiffs for any alleged violation of said statute.

4. Plaintiffs further pray that they be granted temporary injunction pending the final hearing and disposition of this cause whereby the said defendants, their deputies, assistants and each and every one of them be enjoined and restrained as heretofore prayed.

5. Plaintiffs further pray that they be granted a temporary restraining order pending the final hearing and disposition of this cause, whereby the said defendants, their deputies, assistants and subordinates, and each and every one of them be enjoined and restrained as hereinbefore prayed.

6. And plaintiffs further pray that they have other and further relief as to the Court may seem just and equitable in the premises.

Dated at Honolulu, this 22 day of November, 1946.

(S.) W. Y. Char, Attorney for plaintiffs.

[fol. 18] *Duly sworn to by Kam Moi jurat omitted in printing.*

[fol. 19] EXHIBIT "A" TO BILL OF COMPLAINT

Chapter 31. Teaching of Foreign Languages.

Sec. 1871. Declaration of legislative findings. It is hereby declared that the study and persistent use of foreign languages by children of average intelligence in their early and formative years definitely detract from their ability properly to understand and assimilate their normal studies in the English language, which are required by law to be pursued by all children of school age, and definitely retard their progress in understanding and assimilating such studies; that the study and persistent use of such foreign

languages in such early and formative years may and do, in many cases, cause serious emotional disturbances, conflicts and maladjustments; that the teaching of foreign languages compels and encourages the study and persistent use of such foreign languages, to the detriment, as aforesaid, of children in their early and formative years; that it is to the best interest, and will best promote the health and welfare, of children of tender age that such foreign language studies not be undertaken until each child shall have completed and passed at least the fourth grade or shall have attained the age of nine years, unless such child is earlier able to speak, write and read the English language and has attained a test score of at least 5.0 on standard tests in composition and in reading; and that the teaching and study of foreign language to and including the eighth grade or the age of fifteen years should be regulated in the public interest to avoid the detrimental results herein set forth to which end each of the provisions of this chapter are enacted. (L. 1943, c. 104, s. 1)

Sec. 1872. Definitions. As used in this chapter:

"School" means any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice.

"Public school" means a public school as defined in section 1821.

"Standard test" shall be the test which is so designated and determined by the department of public instruction from time to time from such tests as are generally recognized by educators. (L. 1943, c. 104, s. 2.)

Sec. 1873. Requirements for pupil. No child shall be taught a foreign language in any school unless he shall comply with one of the following requirements: (a) That he shall have passed the fourth grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the department of public instruction attaining a score not lower than normal for his grade; or (b) that he shall have passed the [fol. 20] eighth grade in public school or its equivalent;

or (c) that he shall have attained the age of fifteen years. (L. 1943, c. 104, s. 3.)

Sec. 1874. Requirements for teacher. No school shall permit the teaching of any foreign language to any child under the age of fifteen unless the teacher shall have been examined and certified by a board of examiners of three persons appointed by the commissioners of public instruction to be reasonably well versed in the usage and idiom of both the English language and the foreign language to be taught by such teacher. The commissioners of public instruction shall appoint one or more of such boards of examiners as may be necessary. Of the members of each such board, at least two shall be well versed in the usage and idiom of both the English language and the foreign language to be taught by the teacher to be examined, and the third shall be well versed in the usage and idiom of at least one of said languages. Such board shall examine each applicant to teach such foreign language. If such applicant is found to be qualified pursuant to this section, such board shall so certify to the commissioners, who shall cause a certificate of such qualification to be issued to such teacher. No charge shall be made for such examination and certification. The expenses of such boards of examiners, including compensation, if any, allowed by the commissioners of public instruction, shall be paid out of any appropriations for the department of public instruction for gene al administration or teachers' salaries, or both. (L. 1943, c. 104, s. 4.)

Sec. 1875. Visitation. Any supervising principal, or other duly authorized representative of the department of public instruction of the Territory, at any time during which such school is in operation, shall have power to attend any school, for the purpose of ascertaining whether the provisions of this chapter are being complied with, and it shall be the duty of every person in charge of, or employed at, such school to permit such representative of the department at any such time to attend the classes and activities of such school for said purposes. (L. 1943, c. 104, s. 5.)

Sec. 1876. Injunctive enforcement. In the event any school or any person shall be found to be violating, or failing to comply with any of the requirements of, this chapter, or there shall be reasonable cause to believe that such school or person is violating, or failing to comply with

the requirements of, this chapter, the attorney general, at his own instance or at the request of the department of public instruction, shall institute appropriate proceedings in equity in the circuit in which the violation occurs to enjoin the performance of any acts or practices forbidden by this chapter, or to require such school or person to comply with the requirements of this chapter. Jurisdiction to hear and dispose of all actions under this section is hereby conferred upon each circuit judge, and each such judge shall have power to issue such orders and decrees, by way of injunction, mandatory injunction or otherwise, as may be appropriate to enforce the provisions of this chapter. In the event any respondent or respondents shall fail or refuse to comply with any such order or decree, the court, in addi-[fol. 21] tion to any other powers hereby granted, shall have power to enjoin the operation and conduct of such school until and unless this chapter is complied with or satisfactory assurance is given that this chapter will be complied with. The county attorney of each county shall, at the request of the attorney general, conduct such proceedings in behalf of the Territory. All such suits shall be brought in the name of the Territory by the attorney general. (L. 1943, c. 104, s. 6.)

[fol. 22] In District Court of the United States

[Title omitted]

Summons

To the above named Defendant:

You are hereby summoned and required to serve upon W. Y. Char, plaintiff's attorney, whose address is 206 Bishop nat'l. Bank Br. Bldg. an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Wm. F. Thompson, Jr., Clerk of Court. By (S.) Thos. P. Cummins, Deputy Clerk. (Seal.)

Date: ——

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 22a] RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 23rd., day of November, A. D. 1946, I received the within summons and personally served the same upon Ingram M. Stainback, Nils C. Tavares, at Iolani Palace, Honolulu, T. H., by exhibiting the Original Summons to each of them and by leaving with each of them a certified copy of said Summons and Complaint attached thereto. Further service made upon W. H. Loper, by exhibiting the Original Summons to Eleanor H. Desha, Secretary to W. H. Loper, at the Territorial Building, Honolulu, T. H., and by leaving with her a certified copy of the Original Summons and Complaint attached thereto.

(S.) Otto F. Heine, United States Marshal.

[fol. 23] [File endorsement omitted]

[fol. 24] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AND ORDER EXTENDING TIME—Filed December 11, 1946

It is hereby stipulated and agreed by and between the parties above named through their respective attorneys that the defendants herein shall be granted an extension of time to move, answer or otherwise plead to the complaint filed herein until and including the 23rd day of December 1946.

Ingram M. Stainback, Nils C. Tavares, and W. H. Loper, defendants above named, By (S.) Rhoda V. Lewis, Assistant Attorney General. Mo Hock Ke Lok Po, an eleemosynary corporation, Dai Kung Chinese School, an eleemosynary corporation, and Chung Shan Chinese School Association, an eleemosynary corporation, plaintiffs above named, By (S.) W. Y. Char.

Dated at Honolulu, T. H., this 11th day of December, 1946.

[fol. 25] [Title omitted.]

ORDER

Upon reading filing the foregoing stipulation it is hereby ordered that the time of the defendants herein to move, answer or otherwise plead to the complaint of the plaintiffs in this action be and the same is hereby extended to and including the 23rd day of December 1946.

Dated at Honolulu, T. H., this 11 day of December, 1946.

(S.) J. Frank McLaughlin Judge, United States District Court, District Court of Hawaii.

[fol. 26] [File endorsement omitted.]

[fol. 27] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION FOR ALLOWANCE OF PRELIMINARY INJUNCTION—Filed December 13, 1946

Come now the plaintiffs in the above entitled cause, by their attorney, W. Y. Char, and move this Honorable Court that the Temporary Injunction, prayed for in the Bill filed herein, be granted on the ground that unless the defendants in said cause are enjoined, as prayed for in said Bill, the said plaintiffs will suffer irreparable and immediate harm and injury.

This motion is based on the record in said cause and on the affidavit of Kam Moi hereto attached and made a part hereof and to which reference is hereby made.

Dated at Honolulu, T. H., this 9th day of December, 1946.

(S.) W. Y. Char, Attorney for plaintiffs.

[fol. 28] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted.]

AFFIDAVIT OF KAM MOI IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

UNITED STATES OF AMERICA,
Territory of Hawaii, ss:

Now comes Kam Moi and being first duly sworn on oath deposes and says:

That he is the President of Dai Kung Chinese School, one of the plaintiffs in the above entitled cause.

That plaintiffs are eleemosynary corporations incorporated for the sole purpose of conducting Chinese language schools and have been carrying on said business for many years. During World War II, from December 7, 1941, to the middle of 1945, the United States Army authorities occupied the school premises of the plaintiffs. Within the last few months the said United States Army authorities returned the premises to the plaintiffs. Whereupon, the plaintiffs were and still are desirous of reopening their schools to teach the Chinese language to their students.

[fol. 29] That there is not now pending in any Circuit Court of the Territory of Hawaii or in the Supreme Court of said Territory of Hawaii any suit or action for the purpose of determining the constitutionality or otherwise of Chapter 31 of the Revised Laws of Hawaii 1945.

That during the pendency of this suit to determine the constitutionality of said Chapter 31 of the Revised Laws of Hawaii 1945, the attorney general of the Territory of Hawaii, to-wit: Nils C. Tavares, through the public press and otherwise, proclaimed that all persons conducting foreign language schools without compliance with the provisions of said Chapter 31 of the Revised Laws of Hawaii 1945 as well as all teachers teaching in said schools would be restrained from so conducting said schools and so teaching in said schools; that he would strictly enforce said Chapter 31 of the Revised Laws of Hawaii 1945 by injunctive proceedings, followed by contempt proceedings upon

failure to comply with orders of injunctive relief, and fines and jail sentences.

That affiant was informed by W. Y. Char, the attorney for plaintiffs, and upon such information alleges and avers, that in a conversation had with the Honorable Nils C. Tavares, one of the defendants above named, and attorney general of the Territory of Hawaii, that unless the provisions of said Chapter 31 were complied with, he, the said attorney general, would proceed against any foreign language school which attempted to reopen its school by injunction as in said Chapter 31 provided.

That upon the receipt of said information, all of the language schools, including plaintiffs herein, were afraid that the said threats by injunction and suits would be carried [fol. 30] out against them and were unwilling to reopen and conduct their said schools in defiance of said Chapter 31; that unless the said defendants be enjoined from enforcing the provisions of said Chapter 31 of the Revised Laws of Hawaii 1945, and unless such injunctive relief be immediately afforded, the said plaintiffs will be deprived of patronage and their business and property will be destroyed and utterly ruined.

That it is provided in said Chapter 31 that no person shall teach in a foreign language school unless he shall have obtained a certificate from the Commmissioners of Public Instruction so to do and said Chapter 31 further provides that no certificate shall be granted unless and until the Commissioners of Public Instruction are satisfied that the applicant for the same is reasonably well versed in the usage and idiom of both the English language and the foreign language.

That in the schools referred to in said Bill, which are conducted for each grade for one hour for each school day, nothing contrary to American history and American institutions and principles of democracy is taught, the instruction being confined to the speaking, reading and writing of the Chinese language; that while the Commissioners of Public Instruction, under the said Chapter 31 must be satisfied that the said teachers and others are reasonably well versed in the usage and idiom of the English language, and that the said provision requiring a knowledge of the English language has no value to the plaintiffs in this case or the teachers who are employed by the plaintiffs; that

unless restrained by this Honorable Court, under the said Chapter 31, the Commissioners of Public Instruction will be able to deprive the said schools of teachers proficient in [fol. 31] the Chinese language but not reasonably well versed in the usage and idiom of the English language to the ruination of said schools.

That in said Chapter 31, it is provided that no child shall be taught a foreign language in any school below the fourth grade in public school or its equivalent; that if said requirement is insisted upon by the Commissioners of Public Instruction, it will reduce the attendance to about one half its normal attendance; it will reduce the tuition fees to about one half; and it will be impossible for said schools to conduct their business and said schools will be compelled to close their doors.

That in said Chapter 31, it is provided that no child shall be taught a foreign language in any school unless he has passed the fourth grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the department of public instruction attaining a score not lower than normal for his grade; that if said requirement is insisted upon by the Commissioners of Public Instruction, it will reduce the normal number of students to such a small number that the inevitable practical result will be the destruction of plaintiffs' primary schools.

That in the schools represented by plaintiffs there were normally about two thousand pupils and said schools employed normally about forty teachers and they will obtain the same number of students and teachers when the schools are reopened; that said schools are maintained and said teachers are paid from voluntary contributions and from the fees of the children attending said schools; that the provisions of said Chapter 31 are so drastic that the parents of children will be afraid to pay tuition fees and other persons [fol. 32] will be afraid to contribute to the funds of said schools lest they be subjected to the injunctive proceedings followed by contempt proceedings and resulting therefrom fines and imprisonment as provided in said Chapter 31, and that, therefore unless immediate relief is afforded by this Honorable Court, the said schools will be unable to pay the teachers' salaries and the expenses of conducting said

schools and the property of plaintiffs in said schools will be utterly destroyed.

(S.) Kam Moi.

Subscribed and sworn to before me this 12th day of December, 1946. (S.) Alfred T. L. Yap (Seal.), Notary Public, 1st Judicial Circuit, Territory of Hawaii. My commission expires: February 16, 1947.

[fol. 33] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF PRESENTATION OF MOTION

To the Honorable Ingram M. Stainback, Nils c. Tavares, and W. H. Loper, defendants, and their attorneys:

Please take notice that the undersigned will present for hearing in the above entitled court, the Honorable J. Frank McLaughlin presiding, on Monday, the 23rd day of December, 1946, at 10 o'clock in the forenoon of said day, the motion of the plaintiffs in the above entitled cause for a temporary injunction.

Dated at Honolulu, T. H., this 9th day of December, 1946.

(S.) W. Y. Char, Attorney for plaintiffs.

[fol. 34] [File endorsement omitted]

[fol. 35] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER—Filed December 23, 1946

Ingram M. Stainback, Governor of Hawaii, C. Nils Tavares, Attorney General of Hawaii, and W. H. Loper, Superintendent of Public Instruction of the Territory of Hawaii, defendants above-named, for answer to the complaint herein, assert the following defenses in law and fact, to wit:

Defenses in Law

I

The complaint fails to show that the court has jurisdiction over the subject matter of this suit in that it does not show that as to any one of the plaintiffs, taken alone, the matter in controversy exclusive of interest and costs exceeds $3000.

II

The complaint fails to show that the court has jurisdiction over the subject matter of this suit in that, while it [fol. 36] alleges that "the matter in controversy exceeds the sum of $3000 exclusive of interest and costs", this is an allegation of law, and the complaint fails to set forth any facts showing that plaintiffs are unable to obtain qualified teachers in sufficient numbers to instruct the children under fifteen years of age who will be attending Chinese language classes, or that they are unable to obtain sufficient pupils from among those who have passed the fourth grade, or what pecuniary loss; if any, the enforcement of chapter 31 of the Revised Laws of Hawaii 1945 would involve.

III

The complaint fails to show that the matter in controversy exceeds $3000 exclusive of interest and costs in that it appears upon the face of the complaint that the plaintiffs are non-profit corporations having no pecuniary interest in the business of teaching foreign languages.

IV

The complaint fails to show that this is a proper case for class representation, in that it designates as the supposed class eight schools, which is not so great a number as to make it impracticable to bring them all before the court.

V

The complaint fails to show that this is a proper case for class representation, in that it does not show that the five remaining schools (not joined as plaintiffs), are desirous of teaching the Chinese language to children who do not comply with the requirements of chapter 31 of the Revised

Laws of Hawaii 1945, or of employing teachers who do not [fol. 37] comply with the requirements of said chapter.

VI

The complaint fails to state a claim for relief in that the enforcement of said chapter 31 of the Revised Laws of Hawaii 1945 would be by a suit in equity, and violation, or failure to comply with the provisions of said chapter, would not subject the plaintiffs or any other person to any fine, penalty, jail sentence or other forfeiture, even though they should be adjudicated to have violated or failed to comply with said chapter, provided they abided by the order and decrees of the equity court that in the course of said enforcement proceeding every issue arising or which may arise by reason of said statute may be raised.

VII

Although the enforcement proceeding provided by the statute does not now afford plaintiffs opportunity to litigate the issues arising or which may arise by reason of said statute, since plaintiffs are not now operating any schools and an enforcement proceeding would be premature, nevertheless plaintiffs do not show that they will be injured unless they obtain adjudication of such issues before reopening their schools.

VIII

The complaint fails to state a claim for equitable relief in that it fails to show that such equitable relief will prevent or avoid irreparable injury which otherwise would occur.

IX

The complaint fails to show that a multiplicity of suits [fol. 38] will result unless equitable relief is granted in this action, in that the expected suits would be in a court of equity having the same power to avoid repetitious hearing of the same issues of law and fact as has this court.

X

The complaint fails to show that a multiplicity of suits will result unless equitable relief is granted in this action, in that it appears that in so far as the issues are the same

with respect to all of the plaintiffs the hearing of one suit would suffice to dispose of all such suits.

XI

The complaint fails to state a cause of action in that it fails to show an invalid use of the police power which was conferred upon the legislature of the Territory of Hawaii by section 55 of the Hawaiian Organic Act.

Answer to the Averments of the Complaint

XII

Defendants admit the allegations of paragraph I of the complaint, save that the name of the Attorney General of Hawaii is C. Nils Tavares, and not Nils C. Tavares as therein stated.

XIII

Answering paragraph II of the complaint:

a. Defendants allege that Mo Hock Ke Lock Po, Tai Koong School, and Chung Shan School, formerly known as Wah Mun Chinese School Association, are non-profit corporations incorporated under the laws of the Territory of [fol. 39] Hawaii. Defendants are informed and believe and upon such information and belief allege that said corporations are the same parties as those who have joined as plaintiffs herein under other names.

b. Defendants are informed and believe and upon such information and belief allege that, and as the complaint itself shows, said corporations are not now conducting schools nor are there any teachers now employed by plaintiffs.

c. Defendants admit that prior to December 7, 1941 the plaintiffs employed teachers of Chinese in schools conducted by them, and that in a few instances said teachers were citizens of the Republic of China. Defendants are without knowledge or information sufficient to form a belief as to the citizenship of the parents of the children who formerly attended said schools.

(d). Defendants deny that plaintiffs were incorporated for the sole purpose of conducting schools for the education of children in the Chinese language.

c. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment that plaintiffs are now prepared to resume conducting of said schools.

XIV

Defendants deny each and every allegation contained in paragraph III of the complaint.

XV

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph IV of the complaint, save that defend- [fol. 40] ants are informed and believe and upon such information and belief allege that prior to December 7, 1941 there were a number of schools which taught the Chinese language without offering a complete school curriculum. The latest information as to these schools possessed by the defendants is as of December 31, 1940. At that time there were eight of such schools employing more than fifty teachers.

XVI

Defendants deny each and every allegation contained in paragraph V of the complaint.

XVII

Answering paragraph VI of the complaint:

a. Defendants admit that Mo Hock Ke Loek Bo did conduct a school in which the Chinese language was taught prior to December 7, 1941, but defendants are informed and believe and upon such information and belief allege that said corporation is not now operating any school.

b. Defendants are without knowledge and information sufficient to form a belief as to the number of members of said corporation at the present time.

c. Defendants are without knowledge or information sufficient to form a belief as to the number of teachers and pupils in said school, and the distribution of them among the various classes immediately prior to December 7, 1941, the latest information possessed by the defendants being as of December 31, 1940.

d. Defendants are without knowledge or information sufficient to form a belief as to the value of the property owned [fol. 41] by the plaintiff Mo Hock Ke Lock Bo but allege that if such property is of the value of $100,000 such property holding is in excess of the corporate powers of said plaintiff; defendants allege that in and by its charter of incorporation the amount of real and personal property which may be held by said plaintiff is limited to $50,000 in value.

XVIII

Answering paragraph VII of the complaint:

a. Defendants admit that Tai Koong School, if it be the same as the plaintiff which has joined herein under the name of "Dai Kung Chinese School", did conduct a school in which the Chinese language was taught prior to December 7, 1941.

b. Defendants are without knowledge or information sufficient to form a belief as to the number of teachers or pupils in said school immediately prior to December 7, 1941, the latest information possessed by the defendants being as of December 31, 1940.

c. Defendants are without knowledge or information sufficient to form a belief as to the amount of property owned by said corporation.

XIX

Answering paragraph VIII of the complaint:

a. Defendants admit that Chung Shan School, if it be the same as the plaintiff which has joined herein under the name of "Chung Shan Chinese School Association", operated a school in which the Chinese language was taught prior to December 7, 1941.

b. Defendants are without knowledge or information [fol. 42] sufficient to form a belief as to the number of students in said school and the distribution thereof among the various classes immediately prior to December 7, 1941, the latest information possessed by the defendants being as of December 31, 1940.

c. Defendants are without knowledge or information sufficient to form a belief as to the value of the property owned by said corporation.

XX

Answering paragraph IX of the complaint, defendants admit that, and as the court judicially knows, the Legislature of the Territory of Hawaii at its regular session of 1943, did pass Act 104, entitled "An Act regulating the teaching of foreign languages to children", and said Act 104 of the Session Laws of Hawaii 1943 is now chapter 31 of the Revised Laws of Hawaii 1945. As the court judicially knows, said Revised Laws of Hawaii 1945 were enacted by Act 1 of the Session Laws of Hawaii 1945, section 2, subsection g of which continues in effect section 7 of said Act 104 of the Session Laws of Hawaii 1943, notwithstanding the fact that said section 7 is not contained in chapter 31 of the Revised Laws of Hawaii 1945. Said section 7 is not contained in plaintiffs' Exhibit A, which is a copy of chapter 31 of the Revised Laws of Hawaii 1945; it reads as follows:

> "Section 7. [Saving Clause.] If any portion of this Act, or the application thereof to any person or circumstance, shall be held to be unconstitutional or invalid, the remainder of this Act, or the application of such portion to other persons and circumstances, shall not be affected."

[fol. 43]

XXI

Answering paragraph X of the complaint:

a. Defendants are informed and believe and upon such information and belief allege that the plaintiffs are not now conducting any schools and that there are not now in operation any schools which teach the Chinese language without offering a complete school curriculum.

b. Defendants are without knowledge or information sufficient to form a belief as to the number of the teachers formerly engaged in the teaching of the Chinese language who are unable to read, write and speak the English language, save that defendants are informed and believe and upon such information and belief allege that with only a few exceptions such teachers were American born.

XXII

Answering paragraph XI of the complaint, defendants are informed and believe and upon such information and

belief allege that there are not now operating in the Territory any schools which teach only a foreign language and do not offer a complete school curriculum; that prior to December 7, 1941, there were such schools; that such schools were engaged in teaching not only the Chinese and Japanese languages, but also the Korean language; and that such schools were attended by pupils of Japanese, Chinese and Korean ancestry. Defendants further allege that at the present time the schools which are in operation and which are affected by said chapter 31 of the Revised Laws of Hawaii 1945 include both public and private schools and that said schools now in operation all offer a complete school curriculum.

[fol. 44]

XXIII

Answering paragraph XII of the complaint:

a. Defendants are informed and believe and upon such information and belief allege that the plaintiffs are not now operating any schools in the Territory of Hawaii. Defendants admit that the schools formerly operated by the plaintiffs were not held for pupils of school age during the hours when the public schools and other schools offering a complete school curriculum were open. Defendants allege that the schools operated by the plaintiffs did not offer a complete school curriculum.

b. Defendants allege that the Chinese language is taught to the pupils in the public schools as an elective course, that such course is offered wherever there is a sufficient demand therefor, and that the teachers employed to teach such courses are qualified therefor.

XXIV

Answering paragraph XIII of the complaint defendants admit that the performance of administrative duties is necessary in order to operate schools. Defendants are without knowledge or information sufficient to form a belief as to the language spoken by the persons with whom plaintiffs formerly dealt in the performance of such administrative duties. Further, defendants allege that they do not intend to regulate in any way the language spoken in the performance of administrative duties, or to require that persons who perform administrative duties, without undertaking to teach any foreign language to children under the

age of fifteen, shall be examined with respect to the language spoken by them or their knowledge thereof.

[fol. 45]

XXV

Defendants deny each and every allegation contained in paragraph XIV of the complaint.

XXVI

Defendants deny each and every allegation contained in paragraph XV of the complaint.

XXVII

Defendants deny each and every allegation contained in paragraph XVI of the complaint.

XXVIII

Defendants deny each and every allegation contained in paragraph XVII of the complaint. Further, defendants allege that they do not intend to exercise the powers of visitation conferred by section 1875 of chapter 31 of the Revised Laws of Hawaii 1945 except for the purpose of ascertaining whether the provisions of said chapter are being complied with.

XXIX

Answering paragraph XVIII of the complaint defendants C. Nils Tavares and W. H. Loper admit that as Attorney General of Hawaii, and Superintendent of Public Instruction, respectively, they are charged with the duty of enforcing said chapter 31 of the Revised Laws of Hawaii 1945 in the manner set forth in section 1876 thereof, and Ingram M. Stainback admits that as Governor of Hawaii he is charged with responsibility for the faithful execution of the laws of the Territory of Hawaii, as well as the laws of the United States within said Territory, in and by section 67 of the Hawaiian Organic Act.

[fol. 46]

XXX

Answering paragraph XIX of the complaint defendants deny each and every allegation therein contained save that defendants admit that if the plaintiffs should violate or fail to comply with the requirements of chapter 31 of the Revised Laws of Hawaii 1945, or there should be reasonable

cause to believe the same to be true, they would institute appropriate proceedings in equity to enjoin the performance of the acts or practices forbidden by said chapter or to require compliance with the requirements of said chapter. Defendants deny that thereby plaintiffs will be prevented from reopening or conducting their schools, or will be deprived of the right to engage in such vocation, business of enterprise, and deny that thereby parents of Chinese ancestry or other parents will be denied the privilege of having their children instructed in the language of their ancestors.

XXXI

Defendants deny each and every allegation in paragraph XX of said complaint contained.

XXXII

Defendants deny each and every allegation contained in paragraph XXI of the complaint save that defendants admit that if any school or any other person should violate or fail to comply with the requirements of chapter 31 of the Revised Laws of Hawaii 1945, or there should be reasonable cause to believe the same to be true, they would institute appropriate proceedings in equity as provided in section 1876 of the Revised Laws of Hawaii 1945.

[fol. 47] XXXIII

Defendants deny each and every allegation contained in paragraph XXII of the complaint.

Further Averments

XXXIV

Defendants allege that:

a. As the court judicially knows all children in the Territory of Hawaii between the ages of six and sixteen years are required to attend a public or private school, with minor exceptions. This is necessary in order to prepare the children to assume the duties and privileges of citizens.

b. At all schools fulfilling the requirements of said compulsory attendance law the basic studies are conducted in English.

c. The teaching of foreign languages is regulated by chapter 31 of the Revised Laws of Hawaii 1945, and said law applies alike to schools which offer a complete school curriculum fulfilling the requirements of the compulsory attendance law and to schools which do not, and applies to schools which teach European and ancient languages as well as to schools which teach oriental languages.

d. The ability of children to successfully complete their basic school studies is adversely affected in cases of deficiency in English.

e. The studying by young children of two dissimilar languages at the same time, such as English and Chinese, adversely affects the attaining of proficiency in either lan- [fol. 48] guage, due to the conflicts arising from the dissimilarities.

f. The studying by young children of two languages at the same time, such as English and Chinese, may and does in many cases cause serious emotional disturbances, conflicts and maladjustments in such children, due to dissimilarities in such languages.

g. In the case of oriental languages the methods and techniques of instruction are dissimilar from those employed in the public and private schools of the Territory which offer the basic school studies, and such dissimilarities increase the emotional disturbances, conflicts and maladjustments in the children caused by the dissimilarities in the languages themselves.

h. Such disturbances, conflicts and maladjustments in a child arise from the pursuit of a foreign language as a course of study at a too early grade, and from the persistent use of such foreign language incident to such course of study, as distinguished from mere familiarity with such foreign language in and about the family home.

i. Deficiency in English is a serious problem in the schools of the Territory of Hawaii, despite the fact that practically all of the school children are American born, and over eighty-five per cent of the total population is American born. One of the principal causes of this English deficiency has been the teaching of foreign languages, particularly oriental languages, to children before they had a sufficiently firm foundation in English. It is necessary that the study

of foreign languages be deferred for a reasonable period in order that the schools of the Territory, both public and [fol. 49] private, may fulfill their purpose of accomplishing universal education in the basic studies, which are conducted in English.

j. Ordinarily a child does not attain a sufficiently firm foundation in English or sufficient maturity to undertake the study of a foreign language, without adverse effect on his basic school studies and without adverse effect on the mental health of the child, until he has passed at least the fourth grade.

k. The teaching of foreign languages to school children necessitates a teacher who is sufficiently well versed in English to explain properly the differences in usage and idiom of the two languages, thereby avoiding or minimizing the conflicts set up by the dissimilarities in the two languages. This is true regardless of the age of the child but is particularly true if foreign language instruction is initiated below the ninth grade.

l. A foreign language as a course of study can be more successfully learned by a child who already has passed the fourth grade than by a younger child, and it is not necessary to the learning of a foreign language that a child undertake such course of study before passing the fourth grade.

m. Educators in the Territory of Hawaii today, in private schools as well as the public schools, uniformly defer the undertaking of the study of foreign languages even beyond the fifth grade. This is done purposely, on the basis of expert knowledge of the deleterious effects of bilingual instruction for young children.

n. The teaching of oriental languages as conducted by [fol. 50] schools specializing therein prior to December 7, 1941, but not now in operation, had poor results, and this was partly due to incompetency of some of the teachers.

o. The foregoing allegations of this paragraph XXXIV were found to be true, after due investigation, by the Twenty-Second Legislature of the Territory of Hawaii, as set forth in said act regulating the teaching of foreign languages or in the committee reports adopted by the Senate and House, respectively, certified copies of which are hereto

annexed, marked Exhibits A and B, and hereby made a part of this answer.

p. With respect to the provision that a student of foreign languages who has not yet passed the eighth grade may be required to pass a standard test in English, defendants intend to require only such proficiency in English as must be attained by other students in the same grade in order to pass in English studies in the public schools of the Territory.

XXXV

Defendants intend to enforce the provisions of chapter 31 of the Revised Laws of Hawaii 1945 and each and every provision thereof separately in the manner therein provided, and in the event of invalidity of any of such provisions the defendants intend to enforce the others of such provisions, that is to say:

a. Defendants intend to so enforce the requirement that teachers of foreign languages shall demonstrate their proficiency in such languages, in order that children and their parents may be guarded against the waste of time and money, and the deleterious effects upon the children, attend- [fol. 51] ant upon instruction by incompetent teachers.

b. Defendants intend to so enforce the requirement that teachers of foreign languages shall demonstrate that they are reasonably well versed in the usage and idiom of the English language, if they wish to undertake the instruction of children under fifteen years of age, in order that such teachers may be able to explain properly the differences between English and the foreign language taught, thereby avoiding or minimizing the conflicts set up by the dissimilarities in the two languages.

c. Defendants intend to so enforce the requirement that students under the age of fifteen, in order to undertake the study of a foreign language, shall have passed the fourth grade in public school or an equivalent course of study, thereby avoiding or minimizing the deleterious effects of bilingual instruction at too early an age.

d. Defendants intend to so enforce the requirement that students under the age of fifteen who have not yet passed the eighth grade and who are studying or about to undertake the study of a foreign language, may be required to

demonstrate, by a standard test as defined in chapter 31 of the Revised Laws of Hawaii 1945, that they have such proficiency in English as must be attained by other students in the same grade in order to pass in English studies in the public schools of the Territory, thereby protecting such children against failure in their basic school studies through deficiency in English.

[fol. 52] Dated at Honolulu, T. H., this 20th day of December 1946.

(S.) Rhoda V. Lewis, Acting Attorney General, Attorney for Defendants.

[fol. 53] EXHIBIT "A" TO ANSWER

Territory of Hawaii
Board of Commissioners of Public Archives.
Honolulu

I, Maude Jones, Archivist of the Board of Commissioners of Public Archives, do hereby certify that the attached document is a true and accurate copy of a report appearing on pages 363, 364 and 365 of the Senate Journal of the Twenty-Second Legislature of the Territory of Hawaii, Regular Session, 1943 on file in the Public Archives, at Honolulu, Territory of Hawaii.

Witness my hand and seal this 17th day of December, A. D. 1946, at Honolulu, Territory of Hawaii.

Maude Jones, Archivist Board of Commissioners of Public Archives. (Seal.)

[fol. 54] Report of the Committee on Education of the Senate Twenty-Second Legislature, Regular Session of 1943, on Senate Bill No. 158, Entitled "An Act to Regulate the Establishment and Operation of Foreign Language Schools", (Stand. Com. Rep. No. 123), Senate Journal 1943, Pages 363-365.

Honolulu, T. H., March 30, 1943.

The Honorable Harold W. Rice,
President of the Senate,
Honolulu, T. H.

SIR:

Your Committee on Education to which was referred Senate Bill No. 158 entitled "An Act to regulate the estab-

lishment and operation of foreign language schools," begs leave to report as follows:

The purpose of the bill is stated in its title.

Your Committee has held a number of hearings on the bill at which all those desiring to do so were permitted to testify. Your Committee also summoned some of the leading educators of the Territory and secured their testimony as to the correctness of the recitals in the preamble and first section of the bill and as to the necessity for such legislation. Among those who testified were the superintendent of public instruction, the president of the University of Hawaii, the dean of the school of education of the University of Hawaii and others. From the testimony adduced at these hearings and your committee's investigation, your committee is of the opinion that the statements set forth in the preamble of this bill, as well as in section 1 thereof, are true, but that they do not go far enough.

The number of foreign language schools in the Territory, as defined in the bill, which teach any foreign language other than an Oriental language to students under senior high school age or under the eleventh grade are practically nil, and none of them so far has expressed any opposition to the bill. The overwhelming majority of schools which teach foreign languages, therefore, are those which teach the Oriental languages, Japanese, Chinese and Korean, the latter two being very few in number, but the Japanese language schools having been most plentiful until they were closed at the commencement of the present war. None of the Japanese language schools is operating at present due to the fact that they were all closed under martial law. It is, therefore, apparent that the regulation of foreign language schools, other than the Oriental language schools in the Territory, presents no difficult problem. Rather it is the Oriental language schools which in the past have presented and will in the future constitute, a grave problem from the stand [fol. 55] point of the children's welfare.

While there is strong reason to believe that the Japanese language schools in the past have been a means of disseminating detrimental propaganda from foreign sources to the young children, your committee does not assume to try to remedy the situation from that standpoint, inasmuch as the question of what theories, ideas and ideals should be taught in private schools is one which is difficult to regulate without impinging upon the freedom of speech and

personal freedom guaranteed by the constitution. Your Committee has, therefore, not attempted to devise a method by which this phase of the problem can be controlled.

However, your committee is convinced that the mental health and well-being of young children, as well as their ability to assimilate their English language and other required studies, can be seriously affected by the emotional disturbances, conflicts and maladjustments which are caused by compelling them to be learning two languages at the same time in their earlier years, especially where the differences are as great as those between English and an Oriental language.

From the testimony, your committee believes that the limit of third grade attainment or the age of nine years fixed by the bill is too low, and that the detrimental effects pointed out above and in the bill, arising from compelling these young children to study different languages at an early age under the circumstances existing in this Territory, persist for a much longer time, even into the high school stage. Your Committee therefore believes that setting the limit proposed by the bill, at or below which no child can be taught a foreign language, at the sixth grade or the age of thirteen would be very conservative, and the concensus of educators bears this out. Some educators insist that it should even be much higher. At the suggestion of the educators, a third qualification, in addition to age or scholarship attainment, is suggested, namely, that if the child before it passes the sixth grade or attains the age of thirteen years, is able to read, speak and write the English language to the extent where it can attain a test score of at least 7.0 on standard tests in English composition and reading, such child may, with some degree of assurance against the detrimental effects above pointed out, be permitted to undertake foreign language studies at an earlier stage.

On the other hand, inasmuch as it seems to be the concensus of educators, and is found by your committee, that the difficulties caused by studying foreign languages might persist even into the high school stage, your committee also believes that teachers of such foreign languages should be required to pass an examination in proficiency in both the English and the foreign language to be taught, in order to insure, not only that such teachers will be able to explain properly to the students the differences in usage and idiom [fol. 56] of the English and foreign languages thereby

avoiding or minimizing the detrimental effects pointed out in the bill, but also in order that the children themselves and their parents or those responsible for their maintenance may be protected against fraud and imposition, which your committee finds has heretofore been freely practiced upon them in some of the Oriental language schools by the employment of incompetent teachers. In this connection your committee finds that, although Oriental language schools have flourished in the Territory for several decades, it seems to be unanimously conceded that the results of their teaching of the Oriental languages have been notoriously poor, most of the students who have attended such Oriental language schools being unable to speak, read or write the languages they have studied with any degree of the proficiency which would normally be expected if they had been properly instructed. The requirement of examining such teachers in their proficiency in these languages will, your committee believes, tend to minimize this imposition which appears to have been practiced upon students and parents alike in the past.

Your Committee has caused the bill to be redrafted to clarify the same and to conform to the recommendations and suggestions hereinabove set forth, and submits such redraft herewith, with the recommendation that the bill be amended to read as set forth in such redraft, and that, as so amended, the bill pass.

Respectfully submitted, Clem Gomes, Chairman, A. Kamokila Campbell, Wm. H. Heen, V. A. Caryalho, Charles H. Silva.

[fol. 57] EXHIBIT "B" TO ANSWER

Territory of Hawaii
Board of Commissioners of Public Archives
Honolulu

I, Maude Jones, Archivist of the Board of Commissioners of Public Archives, do hereby certify that the attached document is a true and accurate copy of a report appearing on page 916, of the Journal of the House of Representatives of the Twenty-Second Legislature of the Territory of Hawaii, Regular Session, 1943 on file in the Public Archives, at Honolulu, Territory of Hawaii.

Witness my hand and seal this 17th day of December, A. D., 1946, at Honolulu, Territory of Hawaii.

Maude Jones, Archivist, Board of Commissioners of Public Archives. (Seal.)

[fol. 58] Report of the Committee on Education, House of Representatives, Twenty-Second Legislature, Regular session of 1943, on Senate Bill No. 158, Entitled "An Act to Regulate the Establishment and Operation of Foreign Language Schools", (Stand. Com. Rep. No. 314), House Journal 1943, Page 916.

Honolulu, T. H., April 21, 1943

Honorable Roy A. Vitousek,
Speaker, House of Representatives,
Honolulu, T. H.

SIR:

Your Committee on Education, to which was referred Senate Bill No. 158, S. D. 1, entitled: "An Act to regulate the establishment and operation of foreign language schools," reports as follows:

This bill regulates the teaching of foreign languages to young children. Your Committee has held a number of hearings and secured the testimony of educators in the Territory, including some who did not testify before the Committee on Education of the Senate on this same bill.

There is no doubt that the teaching of foreign languages in the past in this territory has impeded the teaching of children in the public schools. This is particularly true in the case of the oriental language schools, because a young child who is learning the English language and our alphabet is bound to have a difficult time simultaneously learning an oriental language which is a wholly different system of reading and writing. In the first place, those languages are picture languages and not made up of letters such as English or any European language. Secondly, the order and paging is exactly the reverse of that which obtains in our system. It follow that the simultaneous mastery of these two diametrically opposed systems of language is extremely difficult for children of tender years.

Your committee agrees with the basic objectives of the bill but feels that there are several amendments necessary.

The bill as drafted would constitute every school in this territory that teaches any foreign language, a "foreign language school." This has met with general objection and neither our public schools nor our full-time private schools relish the idea of being called "foreign language schools."

Your committee feels that the prohibition against the teaching of foreign languages starts at too high a grade and should properly start after the fourth grade in accord-
[fol. 59] ance with the bill as originally drafted. Since the amendments which your committee is recommending no longer deal with the subject as the regulation of foreign language schools, there is no necessity for section 5. The bill has been redrafted to meet these objections. A copy of the redraft is attached.

Your committee recommends that the bill, as amended, pass.

Respectfully submitted, A. Q. Marcallino, Chairman; Wm. J. Nobriga, Henry P. Robinson, Jr., Randolph Crossley, Flora K. Hayes, Henry C. Akina, F. K. Aona.

[fol. 60] [File endorsement omitted.]

[fol. 61] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

DEFENDANTS' OBJECTIONS TO ALLOWANCE OF PRELIMINARY INJUNCTION—Filed December 23, 1946

Come now the defendants and present their objections to the allowance of the preliminary injunction for which plaintiffs applied by a motion noticed for presentation on December 23, 1946, to wit:

I

Plaintiffs did not serve and file with their motion "a brief written statement of reasons in support of the motion and a list of citations of the authorities", as required by rule 2 of the civil rules adopted by this court, effective July 1, 1946.

II

Defendants reassert all of the defenses in law and in fact averred by their answer in this cause, herein incorporated by reference.

III

The issuance of the preliminary injunction would effect a change in the status quo, whereas it is the function of a [fol. 62] preliminary injunction to *preserve* the status quo.

IV

Plaintiffs have failed to show that they will suffer irreparable injury if an injunction is not issued pending the final hearing of this cause.

V

It is not the function of a preliminary injunction to prejudge the case. It is apparent that the plaintiffs seek such injunction with the idea that they may rely upon it in reopening their schools, as though it were an adjudication of the issues. If plaintiffs reopen their schools without the protection of a preliminary injunction they will hazard no penalties, fines, jail sentences or other forfeitures, only the adjudication of a court of equity which they are now seeking.

VI

Defendants deny that the requirements of chapter 31 of the Revised Laws of Hawaii 1945 with respect to teachers and pupils would operate to the ruination of the plaintiffs should they resume operation of schools for the teaching of the Chinese language.

These objections are based upon the record in this cause, particularly the answer of the defendants and Exhibits A and B thereto attached, and upon the affidavits of C. Nils Tavares, Richard E. Meyer, Rhoda V. Lewis, and Benjamin O. Wist hereto annexed.

Dated at Honolulu, T. H., this 23rd day of December 1946.

(S.) Rhoda V. Lewis, Acting Attorney General, Attorney for the Defendants.

[fol. 63] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted.]

AFFIDAVIT OF C. NILS TAVARES, ATTORNEY GENERAL OF HAWAII

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

C. Nils Tavares, being first duly sworn, deposes and says that he is the duly appointed, qualified, and acting attorney general of the Territory of Hawaii and is one of the defendants named in the above-entitled cause.

That he has read the affidavit of Kam Moi attached to the Motion for Allowance of Preliminary Injunction served on December 13, 1946 wherein it is stated that affiant proclaimed that he would strictly enforce chapter 31 of the Revised Laws of Hawaii 1945 by injunctive proceedings "followed by contempt proceedings upon failure to comply with orders of injunctive relief, and fines and jail sentences."

[fol. 64] That affiant intends to enforce the provisions of chapter 31 of the Revised Laws of Hawaii 1945, and each and every part thereof, in the manner set forth in section 1876 thereof, but affiant has never proclaimed or otherwise made the statement above set forth in quotation marks. That affiant is of the belief that in the event it should prove necessary for a court to issue an order or decree to enforce the provisions of said chapter, the respondent or respondents against whom such order or decree was issued would comply therewith and would not act in contempt of said court.

That violation of or failure to comply with the requirements of said chapter 31 of the Revised Laws of Hawaii 1945, or any of them, subjects the school or person so violating or failing to comply with the requirements of said chapter only to adjudication in equity of his legal duties with respect thereto, in the course of which every issue arising or which may arise by reason of said law may be raised; that said chapter 31 of the Revised Laws of Hawaii 1945 does not subject any school or person to any fine, penalty, jail sentence, or other forfeiture on account of his violation or failure to comply with the requirements of said chapter even though he shall be adjudicated to have so violated or failed to comply with the requirements of said

chapter, provided he shall abide by the orders and decrees of the court in such proceeding. That affiant does not intend to enforce said chapter 31 of the Revised Laws of Hawaii 1945, in or by any action or proceeding, civil or criminal, [fol. 65] whatsoever, other than as set forth in section 1876 of said chapter 31 of the Revised Laws of Hawaii 1945.

That in the event it should become necessary to proceed under said section 1876 of chapter 31 of the Revised Laws of Hawaii 1945 affiant intends to so arrange the trial of such proceedings as to avoid repetitious hearings of issues of law and fact between the several schools and persons involved and the Territory, insofar as such issues are the same with respect to the several schools and persons involved, and to call upon the powers of court of equity having jurisdiction of such proceedings for such purpose.

(S.) C. Nils Tavares.

Subscribed and sworn to before me this 14th day of December, 1946. (S.) Ailene Jarrett, Notary Public, First Judicial Circuit, Territory of Hawaii. My Commission expires June 30, 1949. (Seal.)

[fol. 66] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF RICHARD E. MEYER

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

Richard E. Meyer, being first duly sworn, deposes and says: That he is the Assistant Superintendent of Public Instruction and is in charge of the work of the department in the City and County of Honolulu during the absence of W. H. Loper, Superintendent of Public Instruction, who is absent from the City and County of Honolulu on business of the Department of Public Instruction.

That schools specializing in the teaching of the Chinese language have not been operating in the Territory of Hawaii since December 7, 1941. The present fifth and sixth grades of the public and private schools have not had Chinese language instruction to any appreciable extent, the present seventh grade has had little more than a year of

[fol. 67] such instruction and the present eighth grade has had little more than two years of such instruction. None of the students in the ninth, tenth, eleventh and twelfth grades has completed the primary school in Chinese language instruction.

That the Department of Public Instruction has records as to the number of children of Chinese ancestry in the public and private schools in the City and County of Honolulu during the school year 1945-1946, this being the latest information now on file; information as to the school year 1946-1947 will shortly be available.

That according to said latest information approximately one-fourth of the children of Chinese ancestry are in the first four grades of the public and private schools. That the students in grades five to eight, inclusive, of the public and private schools number approximately 1,700 students. That in grades nine to twelve, inclusive, or as special students, there are approximately 2,400 additional students of Chinese ancestry.

That the latest information available to the Department of Public Instruction as to the teaching of the Chinese language in the schools which offered such instruction prior to December 7, 1941, but did not offer a general school curriculum, is information as of December 31, 1940. That according to such information there were sixty-seven Chinese teachers so employed in the City and County of Honolulu of whom fifty-eight were American born and only nine were aliens.

That affiant was present at a conference held on December 14, 1946 in the office of the Attorney General for the purpose [fol. 68] of discussing the construction of section 1873 of Chapter 31 of the Revised Laws of Hawaii 1945. That the two departments were in agreement as to the construction of said provision, and that the letter from the Acting Attorney General dated December 19, 1946, a copy of which is hereto attached and herein incorporated by reference, correctly sets forth the construction thereof as the Department of Public Instruction intends to administer it.

(S.) Richard E. Meyer

Subscribed and sworn to before me this 21st day of December 1946. (S.) Pearl L. Moniz, Notary Public, First Judicial Circuit, Territory of Hawaii. My commission expires: Sept. 10, 1949. (Seal.)

[fol. 69] Territory of Hawaii

Department of the Attorney General
Honolulu

December 19, 1946

Honorable W. H. Loper,
Superintendent of Public Instruction,
Territory of Hawaii,
Honolulu, T. H.

Dear Sir:

Reference is made to your letter of December 13, 1946 and to our conference of December 14, 1946, concerning the proper construction of Chapter 31 of the Revised Laws of Hawaii 1945, which regulates the teaching of foreign languages to children under the age of fifteen years.

It is my understanding that "standard tests" as defined by section 1872, R.L. 1945, have been given by the department to school children from time to time. These are tests published on the mainland and generally recognized by educators, which are adapted to use in the various grades of the schools. Such tests show that school children in Hawaii score below the mainland in proficiency in English. With the exception of children in the English standard schools, children who are considered passing in fourth grade English do not score on these standard tests as high as mainland children who have passed fourth grade English, that is to say, they do not necessarily score 5.0, and the same is true as to succeeding grades.

The requirements to enable a child under fifteen years of age to study a foreign language are set forth in section 1873 of Chapter 31, R.L. 1945. Section 1871 is a declaration of findings, useful in interpretation of section 1873 but not purporting to set forth the requirements imposed by the law. Said section 1873 provides that in order for a child under fifteen years of age to study a foreign language in any school:

1. He must have passed the fourth grade in public school or its equivalent. This means that he must have passed the fourth grade in a public school, or an equivalent course of study by other means, such as a private school. When this section is read with section 1871, the apparent intention is [fol. 70] to protect the child from the disturbing influences

of foreign language study until he has progressed this far in his basic school studies. The age of the child is not decisive, unless the child has attained the age of fifteen years and thereby is excluded from the regulatory provisions of the law.

Upon reading section 1871 with section 1873, it appears that in those rare instances in which a child who has not passed the fourth grade is nevertheless able to attain a test score of 5.0 on standard tests in composition and in reading, such a child may study foreign languages. The attainment of a test score of 5.0 gives assurance of English proficiency sufficient for the child to progress in his basic school studies, and therefore may be considered the equivalent of actual demonstration of progress in the basic school studies through actual passing of the fourth grade.

2. The child may be required to pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the Department of Public Instruction, attaining a score not lower than normal for his grade. As an illustration of the practical application of this provision I will take the case of a child who has passed the fourth grade and is ready for the fifth grade. This child is about to study a foreign language. He may be required to show that he has the proficiency in English required in order to pass fourth grade English studies in the public schools, that is, that his score on the standard tests is at least as high as is attained by the children passing fourth grade English. On the basis of the facts you have furnished me, this may be below the score of 5.0. The purpose is to establish that the child will not fail in his further school studies due to a deficiency in English. Similarly, a child completing the fifth grade who has studied foreign languages for a year may be required to demonstrate by standard tests that he has progressed in his English studies sufficiently to pass fifth grade English. After a child has passed the eighth grade he is no longer subject to such tests.

Respectfully, (S.) Rhoda V. Lewis, Acting Attorney General.

[fol. 71] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF RHODA V. LEWIS

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

Rhoda V. Lewis, being first duly sworn, deposes and says: That she is the Assistant Attorney General of Hawaii and is the Acting Attorney General in the absence of C. Nils Tavares, Attorney General of Hawaii, who has gone to the continental United States, having departed from the Territory on December 15, 1946.

That she has caused an investigation to be made as to the persons of Chinese ancestry who were given special training in the Chinese language by the United States Army at the school conducted at Fort Ruger, Honolulu, Territory of Hawaii, during the war. That she has been furnished by the United States Army with the names of eighty-seven men who received such training.

[fol. 72] That affiant is informed and believes and upon such information and belief does depose that the men so trained by the Army are reasonably well versed in both The Chinese and the English languages, and that with minor exceptions they are citizens of the Territory of Hawaii as well as of the United States.

(S.) Rhoda V. Lewis

Subscribed and sworn to before me this 21st day of December 1946. (S.) Ailene Jarrett, Notary Public, First Judicial Circuit, Territory of Hawaii. My commission expires: June 30, 1949. (Seal.)

[fol. 73] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF BENJAMIN O. WIST

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

Benjamin O. Wist, being first duly sworn, deposes and says: That he is a resident of the City and County of Hono-

lulu, Territory of Hawaii, and is dean of the Teachers' College of the University of Hawaii. That he received his AB degree from Spokane College in the State of Washington, his Master of Arts degree from the University of Hawaii, and his Ph. D. from Yale University in education. That he has spent thirty-five years in educational work in the Territory of Hawaii, during ten years of which he was an elementary school principal, another ten years the president of the Normal School, and the remaining fifteen years dean of the Teachers' College of the University of Hawaii.

That he was one of the witnesses who testified before the [fol. 74] Committees on Education of the Senate and House of Representatives of the Twenty-Second Legislature at the regular session of 1943 upon the consideration of Senate Bill No. 158 which was enacted as Act 104 of the Session Laws of Hawaii 1943, entitled "An act regulating the teaching of foreign languages to children", and became Chapter 31 of the Revised Laws of Hawaii 1945.

That he has read paragraph XXXIV of the Answer of the defendants herein and that the matters of opinion stated in subparagraphs a to n, inclusive, thereof are his opinions, based upon his training and experience as an educator and upon his consultation of studies which have been made by others of the problems of dual-language instruction. That the matters of fact stated in said sub-paragraphs a to n, inclusive, are known to him to be true upon the basis of his own observation or upon the basis of records and statistics on file at the University of Hawaii or the Department of Public Instruction. That upon the trial of this cause, he is prepared to testify and would testify substantially as set forth in said subparagraphs a to n, inclusive, of paragraph XXXIV of defendants' answer.

(S.) Benjamin O. Wist.

Subscribed and sworn to before me this 20th day of December 1946. (S.) Myrtle S. Brodie, Notary Public, First Judicial Circuit, Territory of Hawaii. My commission expires: My Commission expires June 30, 1949. (Seal.)

[fol. 75] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DENYING PRELIMINARY INJUNCTION—Filed January 28, 1941

This matter came on to be heard on the plaintiffs' bill of complaint and motion for allowance of preliminary injunction, and on defendants' objections to allowance of preliminary injunction and the defenses in law averred in defendants' answer, also on file, incorporated in defendants' objections by reference. Plaintiffs presented one affidavit attached to the motion for allowance of preliminary injunction. Defendants presented four affidavits, attached to their objections.

For the purposes of ruling upon the application for a preliminary injunction the Court assumes:

a. That section 266 of the Judicial Code (28 U.S.C. 380), as amended, is inapplicable, Hawaii not being a state.

b. That the allegations of the complaint support the jurisdiction of the Court.

[fol. 76] c. That the allegations of the complaint raise grave doubts as to the constitutionality of the act passed by the territorial legislature on May 6, 1943, effective July 1, 1943, entitled "An Act Regulating the Teaching of Foreign Languages to Children."

These assumptions having been made in favor of the plaintiffs for the purpose of ruling upon the application for a preliminary injunction, the Court nevertheless denies the application upon the basis of the following findings of fact and conclusion of law:

FINDINGS OF FACT

1. The complaint was filed November 22, 1946, but, though prayed for in the complaint, the preliminary injunction was not sought until December 23, 1946.

2. The record before the Court does not present the petition of any parent, pupil, or teacher for the injunctive relief sought.

3. The plaintiffs are not now operating schools. Their schools have been closed since December 7, 1941.

4. The complaint does not show why plaintiffs' schools so closed and remained closed.

5. The Court takes judicial notice that all schools in the Territory of Hawaii were closed by the so-called Military Governor on December 7, 1941.

6. The Court further takes judicial notice that at some time after December 7, 1941, the public schools and some private schools were allowed to reopen.

7. Whether or not plaintiffs' schools could have reopened after December 7, 1941 upon application does not appear [fol. 77] from the record.

8. The Court takes judicial notice that at any rate, as of March, 1943, there were no military controls on schools, and the contested act was not effective until July 1, 1943.

9. Plaintiffs have not shown that at any time in the approximately five years since December 7, 1941 they tried to but could not reopen.

10. While it is alleged that plaintiffs' property was occupied by the Army during the five years, on what basis does not appear, and the Court presumes a lawful tenacy.

11. It has not been shown that other property was not available for the conduct of plaintiffs' schools.

12. It has not been shown that at the present time plaintiffs cannot operate their schools. All that is alleged is that they cannot do so without complying with the territorial law.

CONCLUSIONS OF LAW

1. This ruling does not involve the merits of the case. The Court is not now called upon to decide whether the Act does or does not conform to the Constitution. What the Court has before it at this stage of the case is whether it should apply its extraordinary powers to restrain the defendants from enforcing the mandate of the territorial legislature, pending the eventual outcome of this litigation.

2. The purpose of an injunction is to preserve the existing condition, to prevent the occurrence of an irreparable

[fol. 78] injury pending the final determination of the merits of the case.

3. The Court's power to enjoin should be used sparingly and exercised only in plain, clear cases. Although resting within the Court's discretion, the power to enjoin is to be exercised with deliberation and caution. There must be a showing of urgent necessity to prevent irreparable damage.

4. The burden of making such a showing rests upon the moving parties, the plaintiffs.

5. Upon this question of an injunction against the enforcement of a law, the laws of the Territory are to be treated by this Court the same as the laws of a state would be treated by a federal court sitting in a state.

6. Federal courts are hesitant to enjoin the enforcement of the laws of a state, and no injunction ought to issue against officers of a state clothed with authority to enforce the law in question unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.

7. The law involved carries no criminal penalties for infractions. Enforcement is in equity in the circuit courts of the Territory. Plaintiffs have no reason to fear a court of equity, and there is every reason to believe that their constitutional rights would be fully protected in the equity courts of the Territory and that an appeal, if need be, eventually could be had to the United States Supreme Court.

8. Upon the record the Court concludes that the plaintiffs [fol. 79] are not seeking to preserve the status quo; they want it undone and a situation prior to the 1943 Act restored.

9. Plaintiffs have failed to show grounds for the issuance of a preliminary injunction.

10. The Court, in the exercise of its discretion, hereby concludes that there is no need at this time for the issuance of a preliminary injunction.

It is hereby ordered, adjudged and decreed that plaintiffs' motion for allowance of preliminary injunction be and the same is hereby denied.

This order is based upon the oral decision of January 8, 1947.

Dated at Honolulu, T. H., this 28th day of January 1947.

(S.) Frank McLaughlin; Judge of the United States District Court for the Territory of Hawaii.

[fol. 80] [File endorsement omitted]

Receipt is acknowledged of a copy of the within Motion and Order Setting Date for Hearing, this 14th day of February, 1947.

(S.) W. Y. Char, Attorney for Plaintiffs.

[fol. 81] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION TO SET FOR HEARING THE "DEFENSES IN LAW" OF DEFENDANTS—Filed February 14, 1947

Come now the defendants above named, by their attorney, Thomas W. Flynn, and move this Honorable Court to set for hearing before trial the "Defenses in Law" set forth in the answer heretofore filed herein by said defendants; and that, upon hearing, the complaint of plaintiffs be dismissed for failure to show that this Honorable Court has jurisdiction of this cause, and/or for failure to state a claim for equitable relief.

This motion is made under the provisions of Rule 12, Sections (b) and (d) of the Federal Rules of Civil Procedure, and is based upon the record and pleadings heretofore filed in this cause.

Dated at Honolulu, T. H., this 14th day of February, 1947.

[fol. 82] Ingram M. Stainback, C. Nils Tavares, and W. H. Loper, Defendants, by (S.) Thomas W. Flynn, Deputy Attorney General, Territory of Hawaii, Their Attorney.

ORDER—Filed February 14, 1947

The foregoing motion to set for hearing is granted, and the hearing is hereby set for Friday, the 21 day of February, 1947, at 10:00, A. M.

(S.) Delbert E. Metzger, Judge of the District Court of the United States, District and Territory of Hawaii.

[fol. 83] [File endorsement omitted]

Receipt is acknowledged of a copy of the within Motion to Dismiss and Notice of Motion this 14th day of February, 1947.

(S.) W. Y. Char, Attorney for Plaintiffs.

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION TO DISMISS—Filed February 14, 1947

[fol. 84] Come now the defendants above named by their attorney, Thomas W. Flynn, and move this Honorable Court to dismiss the complaint herein on the ground that said complaint fails to show that this Court has jurisdiction of this cause in that said complaint fails to show that as to each or any one of said plaintiffs the amount in controversy exceeds $3,000.00; and on the further ground that said complaint fails to state a claim for equitable relief, in that it fails to show that such equitable relief will prevent or avoid irreparable injury.

Dated at Honolulu this 14th day of February, 1947.

Ingram M. Stainback, C. Nils Tavares, and W. H. Loper, Defendants, by (S.) Thomas W. Flynn, Deputy Attorney General, Territory of Hawaii, Attorney for Defendants.

[fol. 85] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF MOTION—Filed February 14, 1947

To Mo Hock Ke Lok Po, an eleemosynary corporation, Dai Kung Chinese School, an eleemosynary corporation, and Chung Shan Chinese School Association, an eleemosynary corporation, Plaintiffs, and W. Y. Char, their attorney, please take notice that the foregoing motion will be presented to the Honorable Delbert E. Metzger, Judge of the United States District Court for the District of Hawaii, on the 21st day of February, 1947, at 10:00 A. M., or as soon thereafter as counsel may be heard.

(S.) Thomas W. Flynn, Deputy Attorney General, Territory of Hawaii, Attorney for Defendants.

[fol. 86] [File endorsement omitted]

[fol. 87] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

SUPPLEMENTAL PLEADING—Filed February 24, 1947

Come now the plaintiffs above named, by their attorney, W. Y. Char, and supplement the allegations of Paragraph III of plaintiffs' Bill of Complaint pertaining to the matter in controversy exceeding the sum of $3,000.00, exclusive of interests and costs, as follows:

I

Plaintiff, Mo Hock Ke Lok Po, is an eleemosynary corporation incorporated in 1907 under the laws of the Territory of Hawaii, engaged in owning, operating and conducting an elementary and highschool, known as the Mun Lun Chinese School, for boys and girls between the ages of 5 and 20. The average attendance prior to the time of its closing on December 7, 1941, by martial law, was 1,100, and the annual fee received for each student amounted to about $18.00 per annum making a total of $19,800.00 per annum. The elementary department is divided into eight grades and

the highschool department is divided in four grades; that [fol. 88] from the 1st grade to the 4th grade inclusive, the average attendance was about 300 students paying an annual tuition fees of $4,500.00 per annum, or for the 4-year period making a loss of $18,000.00.

In the highschool grades most of the teachers could not pass the English language test as required by law and, therefore, the school would not be able to obtain qualified teachers, thus eliminating the highschool course containing an average school attendance of about 200 students or a total annual fees of $4,200.00.

The school owns real property worth over $100,000.00 and school equipment about $5,000.00. The annual donations average about $5,000.00.

The effect of the enforcement of the foreign language school act will result in such decimation of the students of this school as to cause reduction in income greatly in excess of $3,000.00, thus jeopardizing the ability of this school to function as a going concern, and also jeopardizing its business and the value of its real property.

The parents are afraid to send their children to school. The school is afraid to enter into contracts with its teachers. The buildings and school facilities and equipment are depreciating in value. All of these injuries cannot be measured adequately in money damages.

II

Plaintiff, Chung Shan Chinese School Association, is an eleemosynary corporation incorporated in 1911 under the laws of the Territory of Hawaii, engaged in owning, operating and conducting an elementary and highschool for boys and girls between the ages of 5 and 20. The average attendance prior to the time of its closing on December 7, [fol. 89] 1941, by martial law, was 850, and the annual fee received for each student amounts to about $18.00 per annum making a total of $15,300.00 per annum. The elementary department is divided in eight grades and the highschool department is divided in four grades; that from the 1st grade to the 4th grade inclusive, the average attendance was about 300 students paying an annual tuition fees of $4,500.00 per annum, or for the four-year period making a loss of $18,000.00.

In the highschool grades most of the teachers could not pass the English language test as required by law and, therefore, the school would not be able to obtain qualified teachers, thus eliminating the highschool course containing an average school attendance of about 100 students or a total annual fees of $2,400.00.

The school owns real property worth over $100,000.00 and school equipment about $5,000.00. The annual donations average about $4,900.00.

The effect of the enforcement of the foreign language school act will result in such decimation of the students of plaintiff as to cause reduction in income greatly in excess of $3,000.00, thus jeopardizing the ability of plaintiff to function as a going concern, and also jeopardizing its business and the value of its real property.

The parents are afraid to send their children to school. The plaintiff is afraid to enter into contracts with its teachers. The buildings and school facilities and equipment are depreciating in value. All of these injuries cannot be measured adequately in money damages.

[fol. 90] III

Plaintiff, Dai Kung Chinese School, is an eleemosynary corporation founded in 1926 and incorporated in 1935 under the laws of the Territory of Hawaii, engaged in owning, operating and conducting an elementary school from the 1st to 4th grade, inclusive, for boys and girls between the ages of 5 and 10. The average attendance prior to the time of its closing on December 7, 1941, by martial law, was 100, and the annual fee received for each student amounted to about $18.00 per annum making a total of $1,800.00 per annum, or for the four-year period making a loss of $7,200.00. There were only 2 teachers and both of whom could not pass the English language test as required by law, thereby eliminating the children in the school as well as the teachers as they come within the requirement of the law forbidding the teaching of foreign language below the 5th grade.

The plaintiff owns real property worth over $10,000.00 and school equipment about $500.00. The annual donations average about $500.00.

The effect of the enforcement of the foreign language school act will result in the entire decimation of the students

of plaintiff as to cause reduction in income greatly in excess of $3,000.00, thus jeopardizing the ability of plaintiff to function at all. All of these injuries cannot be measured adequately in money damages.

Dated: Honolulu, T. H., February 24, 1947.

Mo Hock Ke Lok Po, Dai Kung Chinese School, and Chung Shan Chinese School Association, Pltfs., by (S.) W. Y. Char, Their Attorney.

[fol. 91] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION TO STRIKE PLAINTIFFS' SUPPLEMENTAL PLEADING—
February 25, 1947

Receipt is acknowledged of a copy of the within Motion this 25th day of February, 1947.

(s) W. Y. Char, Attorney for Plaintiff.

[fol. 92] Come now defendants above-named by their attorney Thomas W. Flynn, and move this Honorable Court to strike from the records of this cause the "Supplemental Pleading" filed herein by plaintiffs under date of February 24, 1947, for the reason that the said pleading is vague and indefinite, for the further reason that said supplemental pleading contains conclusions which do not follow from the factual allegations set forth; and for the further reason that said supplemental pleading contains allegations of loss or damage attributed to the provisions of Chapter 31 of the Revised Laws of Hawaii 1945, whereas said Chapter 31, on its face, does not operate so as to impose the alleged restrictions on the plaintiffs.

[fol. 93] Wherefore, defendants renew their motion to dismiss the plaintiffs' bill of complaint.

Dated at Honolulu, T. H., this 25th day of February, 1947.

Rhoda V. Lewis, Assistant Attorney General, Territory of Hawaii, and Thomas W. Flynn, Deputy Attorney General, Territory of Hawaii, Attorneys for Defendants. By (s) Thomas W. Flynn.

[fol. 94] [File endorsement omitted]

[fol. 95] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AMENDED COMPLAINT—Filed June 26, 1947

I

The plaintiffs, Mo Hock Ke Lok Po, Dai Kung Chinese School, and Chung Shan Chinese School Association, are eleemosynary corporations incorporated under the laws of the Territory of Hawaii; the teachers in said schools and the parents of children who were attending said schools are residents of the Territory of Hawaii and some are citizens of the Republic of China. The plaintiffs were incorporated for the sole purpose of conducting schools for the education of children in the Chinese language and they have been conducting the same long prior to the enactment of the Law of 1943 as hereinafter referred to and they are now prepared to resume conducting said schools which were closed during the last World War.

[fol. 96] The plaintiffs, Wah Chan Thom and Wilfred Chong, are citizens of the United States; the plaintiff, Leong Nget Cho, is a citizen of the United States; all said three individual plaintiffs are residents of the Territory of Hawaii.

II

The defendant, Ingram M. Stainback, is the duly appointed, qualified and acting Governor of the Territory of Hawaii; the defendant, Nils C. Tavares, is the duly appointed, qualified and acting Attorney General of the Territory of Hawaii; and the defendant, W. H. Loper, is the duly appointed, qualified and acting Superintendent of Public Instruction of the Territory of Hawaii and as such Superintendent is the executive officer of the Department of Public Instruction of the Territory of Hawaii. Each of said defendants is a resident and citizen of the Territory of Hawaii.

III

During the regular session of the Legislature of the Territory of Hawaii held in the year 1943, there was passed an act designated "Act 104" duly approved on the 1st day of May, 1943, entitled "An act regulating the teaching of languages to children"; that the said Act of 1943 is embodied in the Revised Laws of Hawaii 1943 as Chapter 31. A copy of the Act of 1943 is hereto attached, marked Exhibit "A", which plaintiff pray may be made part of this, their complaint.

Said Act is unconstitutional and violative of the plaintiff's liberty and property without due process of law, in violation of the 5th Amendment to the Constitution of the United States, as will appear more particularly hereinafter.

[fol. 97]

IV

A controversy exists between the plaintiffs and the defendants pertaining to the constitutionality of said statute both on its face and as applied. Said defendants threaten to, and intend to, enforce said statute against the plaintiffs, unless enjoined from so doing by order of this Court.

The plaintiffs herein seek judgment declaring their rights in the premises, and adjudging said Act to be unconstitutional; and seek further an injunction against the defendants restraining the enforcement of said Act by them. The matter in controversy herein exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and cost.

V

This court has jurisdiction herein in that the cause of action herein arises under the Constitution of the United States, under the provision of 28 U. S. Code Section 41 (1). This court, further, has jurisdiction herein under the provisions of 28 U. S. Code Section 400, as well as 8 U. P. Code Section 43, and 28 U. S. Code Section 41 (14).

VI

There are, at this time, in the Territory of Hawaii eight Chinese Schools, five of which are voluntary unincorporated associations similarly situated to said plaintiffs; said schools are owned and conducted by more than three thousand (3,000) persons; the property belonging to said schools

and used and employed in the conduct thereof exceeds in value the sum of Two Hundred Thousand Dollars ($200,000.00); the property of plaintiff language schools and the property of said other schools have all been acquired and said schools have been and are being maintained and supported entirely by private funds paid, contributed and or [fol. 98] raised by the members of said schools; there were about fifty teachers employed in giving instruction therein; in the elementary grades of the schools conducted by plaintiffs and of said other schools throughout the Territory the instruction was confined to the teaching of the Chinese language and the various methods of writing the same. In said grades of said schools, they did not teach anything which is unAmerican or contrary to the ideals of democracy, but on the other hand the teaching in said schools inculcated, and was intended to inculcate, in the minds of the pupils who were attending the same, a respect for the institutions and laws of the United States of America.

VII

This Complaint is filed by the said plaintiffs language schools in their own behalf and on behalf of the other owners of said schools, and on behalf of all other Chinese language schools similarly situated, who may come in and share the cost of these proceedings.

VIII

Plaintiff, Mo Hock Ke Lok Po, is an incorporated association operating the Chinese school known as Mun Lun Chinese School, which was founded in 1907; there are 38 members of said incorporated association; said incorporated association did employ 27 teachers prior to December 7, 1941, and since said date and up to April, 1946, the school closed and permitted its premises to be occupied temporarily by the United States Army as offices; there were 1,100 pupils attending said school of whom 160 were in the first grade and 150 were in the second grade; and the said incorporated association is the owner of property worth $100,000.00.

[fol. 99]

XI

The plaintiff, Chung Shan Chinese School Association, was founded in the year 1911 and was duly incorporated under the laws of the Territory of Hawaii as an elee-

mosynary corporation in 1920; prior to December 7, 1941, and up to October, 1946, the school premises owned by said plaintiff was occupied by the United States Army; prior to December 7, 1941, there were 850 students attending said school of whom 120 were in the first grade and 120 were in the second grade; the said corporation is the owner of property worth about $85,000.00.

XII

There are about 100 foreign language schools in the Territory affected by the said Act; of said schools, 8 are conducted in the Chinese lanugage and the remainder of said schools are conducted in the Japanese language; and all of said foreign language schools are conducted and attended solely by persons of the Chinese and Japanese races.

XIII

In the conduct of said Chinese schools by plaintiff language schools the hours of attendance thereat are so arranged as not to interfere with the attendance by the pupils therein of school age at the government schools of the said Territory; but on the contrary the pupils who attend said schools conducted by said plaintiffs are urged and required to attend the said public schools in their respective communities and said pupils do attend said public schools throughout said terms thereof.

[fol. 100] In said public schools the Chinese language is not taught to the pupils thereof nor are the teachers teaching in said schools qualified to teach said language.

XIV

The plaintiff, Wah Chan Thom, was born in the City of Honolulu, Territory of Hawaii, on April 4, 1903, and has been a permanent r ident of the Territory of Hawaii since his birth; he is a graduate both of a Chinese language school and of the University of Hawaii, having attended prior thereto the public schools of the Territory of Hawaii at Honolulu. Thereafter he did postgraduate work at Northwestern University.

He is now a business executive and owner and manager of Nu Enamel Company, wholesale and retail distributor of sporting goods and paint products.

He is the father of three children, Wing Hom Thom, age 13, now in the 7th grade; Chu Seong Thom, age 8, now in the 3rd grade; and Roland Thom, 3 years of age.

As the parent of said children, said plaintiff desires to have said children taught in a Chinese language School, particularly, Mun Lun Chinese School, because the plaintiff considers the Chinese language to constitute useful knowledge; and said plaintiff considers said study of said Chinese language to be important to the plaintiff as said parent, and to his said children; and said plaintiff desires to educate his said children in said language, free from the supervision and direction of any of the school authorities of the Territory of Hawaii.

[fol. 101] With respect to said Wing Hom Thom, the plaintiff desires that said child study the Chinese language, in a Chinese language school, without being required to take or pass examination of any standard test in English composition or reading under the direction of the Department of Public Instruction of the Territory of Hawaii.

In the event the plaintiff is not permittted to send his said children to a Chinese language school, said plaintiff desires to, and intends to, personally instruct his children in a group of two or more, at home, in the Chinese language, without fee or compensation, and as a regular and customary practice.

XV

The plaintiff, Wilfred Chong, was born in Honolulu, Territory of Hawaii, on October 31, 1910. He is a graduate of a Chinese language School, Mun Lun Chinese School, as well as of St. Louis College, a high school in the city of Honolulu. He is also a graduate of the University of Hawaii. He is Treasurer of Wing Coffee Company, Limited, engaged in the raising and manufacturing of coffee. He is the father of three children, Priscilla, age 13, now attending the 6th grade at St. Andrews Priory; Patsy, 9 years, now in the 3rd grade; and Pamela, 5 years old, going to kindergarten.

With respect to said Priscilla, the plaintiff desires that said child study the Chinese language, in a Chinese language school, without being required to take or pass any examination of any standard test in English composition or reading under the direction of the Department of Public Instruction of the Territory of Hawaii.

In the event the plaintiff is not permitted to send his said children to a Chinese language school, said plaintiff desires [fol. 102] to, and intends to, personally instruct his children in a group of two or more, at home, in the Chinese language, without fee or compensation, and as a regular and customary practice.

XVI

The plaintiffs, Wah Chan Thom and Wilfred Chong, file this suit in their behalf as well as in behalf of approximately 1,000 residents of the Territory of Hawaii of the Chinese descent, parents of children, who desire to send their children to Chinese language schools, and who are in the same class as the said plaintiffs.

XVII

The plaintiff, Leong Nget Cho, is a citizen of the United States and a resident of the Territory of Hawaii. He was born in the Teritory of Hawaii, but went to China at approximately 6 years of age, where he acquired a thorough knowledge of the Chinese langauge. Thereafter, he returned to the Territory of Hawaii where he has been a resident ever since, and for approximately 30 years.

His occupation has been that of a teacher of Chinese in Chinese language schools; and for more than 20 years he has been employed by the Chung Shan Chinese School Association; and he has no other occupation.

He is loyal to the United States and to the principles of the American government. He is not well versed in the usage and idiom of the English language; he does not desire to submit to an examination pertaining to the English language by any board of examiners.

[fol. 103] The plaintiff files this suit in his behalf as well as in behalf of approximately 70 other residents of the Territory of Hawaii, who are Chinese lanuage school teachers by occupation, and who are similarly situated.

XVIII

Said Act, on its face and as enforced, deprives the plaintiffs of liberty and property without due process of law in violation of the 5th Amendment to the Constitution, in the following respects:

(1) The plaintiffs, Mo Hock Ke Lok Po, Dai Kung Chinese School, and Chung Shan Chinese School Associa-

tion, are deprived of property by being deprived of the right to manage their property, and to enter into contracts with teachers, and with parents pertaining to the teaching by said teachers of the Chinese language.

(2) The plaintiffs, Wah Chan Thom and Wilfred Chong, are deprived of the right personally to teach their own children the Chinese language in their homes, and are deprived of the further right of sending their said children to Chinese language schools—schools of their choice, and of the choice of said children; and hence said plaintiffs are deprived, as parents, of the right to bring up their children, and to direct the education of their children, and to acquire useful knowledge for said children; and said Act deprives said plaintiffs, and their said children, of a freedom of thought and freedom of expression, through a language of their own choice.

(3) The plaintiff, Leong Nget Cho, is deprived of the right to follow his occupation.

In addition, the plaintiffs are denied rights under 8 U. S. Code Sec. 41, 42 and 43.

[fol. 104] XIX

Said Act was enacted in 1943, at a time when the plaintiff language schools, and all language schools in the Territory of Hawaii had been closed by the military authorities in Hawaii under martial law, said language schools having been closed in December, 1941. Said martial law continued until 1944. Since said time, and up to the present time, the plaintiff language schools have not reopened their language schools because of said Act and the irreparable injury which said plaintiffs will suffer by virtue of said Act in the following particulars:

In order to resume the teaching of Chinese, on the same basis as conducted by said plaintiff language schools prior to their closing as aforesaid, it is necessary for each of said plaintiffs to expend large sums of money, to wit, sums in excess of $10,000.00 each in order to prepare the buildings for the resumption of said teaching; and it is necessary, further, for them to incur liability by engaging Chinese teachers.

In the event said Act is enforced against said plaintiffs, and said statute is adjudged constitutional, the plaintiffs

and each of them will suffer irreparable injuries as aforesaid, should they resume teaching at this time.

The plaintiffs, Wah Chan Thom and Wilfred Chong, will suffer irreparable injury unless the enforcement of said Act is enjoined by this Court, in that they have been by said Act, and now are, deprived of their constitutional right to teach their children, and to direct the education of their children, as heretofore set forth.

[fol. 105] The plaintiff, Leong Nget Cho, has suffered and will continue to suffer irreparable injury, by virtue of said Act, through the deprivation of his right to follow an occupation of his own choice.

XX

Unless this Court adjudges said Act to be unconstitutional and enjoins its enforcement, all of the plaintiffs will suffer irreparable injury as aforesaid; and plaintiffs have no adequate remedy at law; and have no adequate remedy except by the instant proceeding.

Wherefore, the plaintiffs pray for relief as follows:

(1) That said Act be adjudged unconstitutional; and that a permanent injunction, and an injunction pendente lite, issue.

(2) That the rights of plaintiffs be declared by a declaratory judgment.

(3) That the matter herein be heard by a three judge Court, within the provisions of 28 U. S. Code Sec. 266.

(4) That the plaintiffs have such other relief as is proper.

(S.) W. Y. Char, Attorney for Plaintiffs.

(S.) A. L. Wirin, of Counsel.

[fol. 106] *Duly sworn to by Wah Chan Thom. Jurat omitted in printing.*

[fols. 107-108] Exhibit "A" to amended complaint omitted. Printed side page 19 ante.

[fol. 109] [File endorsement omitted]

[fol. 110] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER TO AMENDED COMPLAINT—Filed July 30, 1947

Ingram M. Stainback, Governor of Hawaii, C. Nils Tavares, Attorney General of Hawaii, and W. H. Loper, Superintendent of Public Instruction of the Territory of Hawaii, defendants above named, for answer to the amended complaint herein, assert the following defenses in law and fact, to wit:

Defenses in Law

I

The complaint fails to show that the court has jurisdiction over the subject matter of the suit brought by the corporate plaintiffs in that it does not show that as to any one of them, taken alone, the matter in controversy exclusive of interest and costs exceeds $3,000.

[fol. 111]

II

The complaint fails to show that the court has jurisdiction over the subject matter of the suit brought by the corporate plaintiffs in that, while it alleges that "the matter in controversy herein exceeds the sum of $3,000 exclusive of interest and costs", this is an allegation of law and the complaint fails to set forth any facts showing that the corporate plaintiffs are unable to obtain qualified teachers in sufficient numbers to instruct the children under fifteen years of age who will be attending Chinese language classes, or that they are unable to obtain sufficient pupils from among those who have passed the fourth grade, or what pecuniary loss, if any, the enforcement of chapter 31 of the Revised Laws of Hawaii 1945 would involve.

III

The complaint fails to show that the matter placed in controversy by the suit of the corporate plaintiffs exceeds $3,000 exclusive of interest and costs in that it appears upon the face of the complaint that the plaintiffs are non-profit corporations having no pecuniary interest in the business of teaching foreign languages.

IV

The complaint fails to show that this is a proper case for class representation, in that:

(a) It designates as one supposed class eight schools, which is not so great a number as to make it impracticable to bring them all before the court, and moreover the complaint does not show that the five remaining schools (not joined as plaintiffs) are desirous of teaching the Chinese [fol. 112] language to children who do not comply with the requirements of chapter 31 of the Revised Laws of Hawaii 1945, or of employing teachers who do not comply with the requirements of said chapter.

(b) The complaint designates as another supposed class approximately one thousand residents of the Territory of Hawaii of Chinese descent, parents of children, but the complaint fails to show that said other residents of Chinese descent desire to have their children educated in the Chinese language in a manner other than permitted by Act 104 of the Session Laws of Hawaii 1943, being chapter 31 of the Revised Laws of Hawaii 1945.

(c) The complaint designates as another supposed class approximately seventy residents of the Territory of Hawaii who are Chinese language school teachers by occupation, but the complaint fails to show that they are unable or unwilling to comply with the provisions of Act 104 of the Session Laws of Hawaii 1943, being chapter 31 of the Revised Laws of Hawaii 1945, requiring that teachers of foreign languages shall be reasonably well versed in the usage and idiom of both the English language and the foreign language to be taught by them.

V

The complaint fails to state a claim for injunctive relief in that the enforcement of said chapter 31 of the Revised Laws of Hawaii 1945 would be by a suit in equity in a court of record of the Territory, and violation, or failure to comply with the provisions of said chapter, would not subject the plaintiffs or any other person to any fine, penalty, jail sentence or other forfeiture, even though they [fol. 113] should be adjudicated to have violated or failed to comply with said chapter, provided they abided by the order

and decrees of the equity court; that in the course of said enforcement proceeding every issue arising or which may arise by reason of said statute might be raised; and that the possibility of such an equity suit in a territorial court does not constitute threatened irreparable injury.

VI

The complaint fails to show that any party is unable or unwilling to comply with the provision of Act 104 of the Session Laws of Hawaii 1943, being chapter 31 of the Revised Laws of Hawaii 1945, which requires that teachers of foreign languages shall be reasonably well versed in the foreign language to be taught by them.

VII

The complaint fails to state a cause of action in that it fails to show an invalid use of the police power which was conferred upon the legislature of the Territory of Hawaii by section 55 of the Hawaiian Organic Act.

Answer to the Averments of the Complaint

VIII

Answering paragraph I of the complaint:

(a) Defendants allege that Mo Hock Ke Lock Bo; Tai Koong School, and Chung Shan School, formerly known as Wah Mun Chinese School Association, are non-profit corporations incorporated under the laws of the Territory of Hawaii. Defendants are informed and believe and upon such information and belief allege that said corporations are the same parties as those who have joined as plaintiffs herein under other names.

[fol. 114] (b) Defendants admit that prior to December 7, 1941 the plaintiffs employed teachers of Chinese in schools conducted by them, and that in a few instances said teachers were citizens of the Republic of China. Defendants are without knowledge or information sufficient to form a belief as to the number of aliens, if any, among the parents of children formerly attending said schools.

(c) Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment

that plaintiffs are now prepared to resume conducting of said schools.

(d) Defendants admit that Wah Chan Thom and Wilfred Chong are citizens of the United States; defendants are without knowledge or information sufficient to form a belief as to the truth of the averment that the plaintiff Leong Nget Cho is a citizen of the United States; defendants admit that all said three individual plaintiffs are residents of the Territory of Hawaii.

IX

Defendants admit the allegations of paragraph II of the complaint, save that the name of the Attorney General is C. Nils Tavares and not Nils C. Tavares as therein stated.

X

Answering the first subparagraph of paragraph III of the compaint, defendants admit that, as the court judicially knows, the legislature of the Territory of Hawaii at its regular session of 1943, did pass Act 104, entitled "An Act regulating the teaching of foreign languages to children", and said Act 104 of the Session Laws of Hawaii [fol. 115] 1943 is now chapter 31 of the Revised Laws of Hawaii 1945. As the court judicially knows, said Revised Laws of Hawaii 1945 were enacted by Act 1 of the Session Laws of Hawaii 1945, section 2, subsection g of which continues in effect section 7 of said Act 104 of the Session Laws of Hawaii 1943, notwithstanding the fact that said section 7 is not contained in chapter 31 of the Revised Laws of Hawaii 1945. Said section 7 is not contained in plaintiff's Exhibit A, which is a copy of chapter 31 of the Revised Laws of Hawaii 1945; it reads as follows:

"Section 7. [Saving Clause.] If any portion of this Act, or the application thereof to any person or circumstance, shall be held to be unconstitutional or invalid, the remainder of this Act, or the application of such portion to other persons and circumstances, shall not be affected."

As to the second subparagraph of paragraph III of the complaint, defendants deny each and every allegation therein contained.

XI

Answering paragraph IV of the complaint:

(a) Defendants admit that if the plaintiffs should violate or fail to comply with the requirements of chapter 31 of the Revised Laws of Hawaii 1945, or there should be reasonable cause to believe the same to be true, they would institute appropriate proceedings in equity to enjoin the performance of the acts or practices forbidden by said chapter or to require compliance with the requirement of said chapter.

(b) Defendants deny that the matter in controversy herein exceeds the sum of $3,000 exclusive of interest and costs.

[fol. 116]

XII

Answering paragraph V of the complaint, defendants reassert all of the defenses in law heretofore asserted.

XIII

Answering paragraph VI of the complaint, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the averments therein contained, save that defendants are informed and believe and upon such information and belief allege that prior to December 7, 1941 there were eight schools which taught the Chinese language in the Territory of Hawaii without offering a complete school curriculum, and they did employ more than fifty teachers.

XIV

Defendants deny each and every allegation contained in paragraph VII of the complaint.

XV

Answering paragraph VIII of the complaint:

(a) Defendants admit that Mo Hock Ke Lock Bo did conduct a school in which the Chinese language was taught prior to December 7, 1941, but defendants are informed and believe and upon such information and belief allege that said corporation is not now operating any school and has not since 1941.

(b) Defendants are without knowledge and information sufficient to form a belief as to the number of members of said corporation at the present time.

(c) The latest information possessed by the defendants as to the number of teachers and pupils in said school, and the distribution of them among the various classes, is in- [fol. 117] formation as of December 31, 1940; according to said information the allegations of the complaint concerning said matters are approximately correct with respect to the operations of said school six or seven years ago.

(d) Defendants are without knowledge or information sufficient to form a belief as to the value of the property owned by the plaintiff Mo Hock Ke Lock Bo but allege that if such property is of the value of $100,000 such property holding is in excess of the corporate powers of said plaintiff; defendants allege that in and by its charter of incorporation the amount of real and personal property which may be held by said plaintiff is limited to $50,000 in value.

XVI

Answering paragraph XI of the complaint:

(a) Defendants admit that Chung Shan School, if it be the same as the plaintiff which has joined herein under the name of "Chung Shan Chinese School Association", operated a school in which the Chinese language was taught prior to December 7, 1941; but defendants are informed and believe and upon such information and belief allege that said corporation is not now operating any school and has not since 1941.

(b) The latest information possessed by the defendants as to the number of students in said school, and the distribution thereof among the various classes is information as of December 31, 1940; according to said information the allegations of the complaint concerning said matters are approximately correct with respect to the operations of said school six or seven years ago.

[fol. 118] (c) Defendants are without knowledge or information sufficient to form a belief as to the value of the property owned by said corporation.

XVII

Answering paragraph XII of the complaint, defendants are informed and believe and upon such information and belief allege that prior to December 7, 1941 there were in operation in the Territory more than one hundred and seventy schools which taught only a foreign language and did not offer a complete school curriculum; that such schools were engaged in teaching not only the Chinese and Japanese languages, but also the Korean language; that such schools were attended by pupils of Japanese, Chinese and Korean ancestry; that such schools were conducted by corporations and associations almost all of which have dissolved, disbanded, or are inactive. Defendants further allege that at the present time the schools which are in operation and which are affected by said chapter 31 of the Revised Laws of Hawaii 1945 include both public and private schools, and almost exclusively are schools offering a complete school curriculum, conducted in English, with foreign language studies also offered.

XVIII

Answering paragraph XIII of the complaint:

(a) Defendants are informed and believe and upon such information and belief allege that the plaintiffs are not now operating any schools in the Territory of Hawaii. Defendants admit that the schools formerly operated by the plaintiffs were not held for pupils of school age during the hours when the public schools and other schools offering [fol. 119] a complete school curriculum were open. Defendants allege that the schools operated by the plaintiffs did not offer a complete school curriculum.

(b) Defendants allege that the Chinese language is taught to the pupils in the public schools as an elective course, that such course is offered wherever there is a sufficient demand therefor, and that the teachers employed to teach such courses are qualified therefor.

XIX

Answering paragraph XIV of the complaint, defendants allege that they are without knowledge or information sufficient to form a belief as to the allegations therein contained. Defendants further allege that they do not intend

to exercise the power of visitation conferred by section 1875 of chapter 31 of the Revised Laws of Hawaii 1945 for the purpose of supervising or directing any teaching or for any other purpose than to ascertain whether the provisions of said chapter are being complied with, as set forth in said law.

XX

Answering paragraph XV of the complaint, defendants allege that they are without knowledge or information sufficient to form a belief as to the allegations therein contained.

XXI

Defendants deny each and every allegation contained in paragraph XVI of the complaint. Further, defendants deny that any considerable number of residents of the Territory of Hawaii of Chinese ancestry desire to have their [fol. 120] children educated in the Chinese language in a manner other than as permitted by Act 104 of the Session Laws of Hawaii 1943, being chapter 31 of the Revised Laws of Hawaii 1945.

XXII

Answering the first three subparagraphs of paragraph XVII of the complaint, defendants allege that they are without knowledge or information sufficient to form a belief as to the allegations therein contained. Defendants further allege that in the application and enforcement of chapter 31 of the Revised Laws of Hawaii 1945 they do not intend to require the plaintiff Leong Nget Cho or any other teacher to be well versed in the usage and idiom of the English language, but intend to require only that such teachers be sufficiently versed in the usage and idiom of the English language to be able to explain properly the differences between English and the foreign language taught.

Answering the last subparagraph of paragraph XVII of the complaint, defendants deny each and every allegation therein contained, and further, defendants are informed and believe and upon such information and belief allege that with only a few exceptions the persons formerly engaged in the teaching of the Chinese language in the Territory of Hawaii were American born, and had long resided in the Territory of Hawaii.

XXIII

Defendants deny each and every allegation contained in paragraph XVIII of the complaint.

XXIV

Defendants deny each and every allegation contained in paragraph XIX of the complaint save that defendants ad- [fol. 121] mit that the proclamation terminating martial law in the Territory of Hawaii was issued October 18, 1944, effective October 24, 1944, but defendants nevertheless deny that on May 1, 1943, the date of enactment of Act 104 of the Session Laws of Hawaii 1943, which became chapter 31 of the Revised Laws of Hawaii 1945, the corporate plaintiffs were prevented by the existence of martial law or by any military orders issued pursuant thereto, from operating their schools. Further answering paragraph XIX of the complaint, defendants allege that the provisions of Act 104 of the Session Laws of Hawaii 1943, being chapter 31 of the Revised Laws of Hawaii 1945, do not prevent or preclude the operation of schools for the teaching of the Chinese language.

XXV

Defendants deny each and every allegation contained in paragraph XX of the complaint.

Further Averments

XXVI

Defendants allege that:

(a) As the court judicially knows all children in the Territory of Hawaii between the ages of six and sixteen years are required to attend a public or private school, with minor exceptions. This is necessary in order to prepare the children to assume the duties and privileges of citizens.

(b) At all schools fulfilling the requirements of said compulsory attendance law the basic studies are conducted in English.

(c) The teaching of foreign languages is regulated by chapter 31 of the Revised Laws of Hawaii 1945, and said [fol. 122] law applies alike to schools which offer a com-

plete school curriculum fulfilling the requirements of the compulsory attendance law and to schools which do not, and applies to schools which teach European and ancient languages as well as to schools which teach oriental languages.

(d) The ability of children to successfully complete their basic school studies is adversely affected in cases of deficiency in English.

(e) The studying by young children of two dissimilar languages at the same time, such as English and Chinese, adversely affects the attaining of proficiency in either language, due to the conflicts arising from the dissimilarities.

(f) The studying by young children of two languages at the same time, such as English and Chinese, may and does in many cases cause serious emotional disturbances, conflicts and maladjustments in such children, due to dissimilarities in such languages.

(g) In the case of oriental languages the methods and techniques of instruction are dissimilar from those employed in the public and private schools of the Territory which offer the basic school studies, and such dissimilarities increase the emotional disturbances, conflicts and maladjustments in the children caused by the dissimilarities in the languages themselves.

(h) Such disturbances, conflicts and maladjustments in a child arise from the pursuit of a foreign language as a course of study at a too early grade, and from the per- [fol. 123] sistent use of such foreign language incident to such course of study, as distinguished from mere familiarity with such foreign language in and about the family home.

(i) Deficiency in English is a serious problem in the schools of the Territory of Hawaii, despite the fact that practically all of the school children are American born, and over eighty-five per cent of the total population is American born. One of the principal causes of this English deficiency has been the teaching of foreign languages, particularly oriental languages, to children before they had a sufficiently firm foundation in English. It is necessary that the study of foreign languages be deferred for a reasonable period in order that the schools of the Territory,

both public and private, may fulfill their purpose of accomplishing universal education in the basic studies, which are conducted in English.

(j) Ordinarily a child does not attain a sufficiently firm foundation in English or sufficient maturity to undertake the study of a foreign language, without adverse effect on his basic school studies and without adverse effect on the mental health of the child, until he has passed at least the fourth grade.

(k) The teaching of foreign languages to school children necessitates a teacher who is sufficiently well versed in English to explain properly the differences in usage and idiom of the two languages, thereby avoiding or minimizing the conflicts set up by the dissimilarities in the two languages. This is true regardless of the age of the child but is particularly true if foreign language instruction is [fol. 124] initiated below the ninth grade.

(l) A foreign language as a course of study can be more successfully learned by a child who already has passed the fourth grade than a younger child, and it is not necessary to the learning of a foreign language that a child undertake such course of study before passing the fourth grade.

(m) Educators in the Territory of Hawaii today, in private schools as well as the public schools, uniformly defer the undertaking of the study of foreign languages even beyond the fifth grade. This is done purposely, on the basis of expert knowledge of the deleterious effects of bilingual instruction for young children.

(n) The teaching of oriental languages as conducted by schools specializing therein prior to December 7, 1941, but not now in operation, had poor results, and this was partly due to incompetency of some of the teachers.

(o) The foregoing allegations of this paragraph XXVI were found to be true, after due investigation, by the Twenty-second Legislature of the Territory of Hawaii, as set forth in said act regulating the teaching of foreign languages or in the committee reports adopted by the Senate and House, respectively, certified copies of which are hereto annexed, marked Exhibits A and B, and hereby made a part of this answer.

(p) With respect to the provision that a student of foreign languages who has not yet passed the eighth grade may be required to pass a standard test in English, defendants intend to require only such proficiency in English [fol. 125] as must be attained by other students in the same grade in order to pass in English studies in the public schools of the Territory.

XXVII

Defendants intend to enforce the provisions of chapter 31 of the Revised Laws of Hawaii 1945 and each and every provision thereof separately in the manner therein provided, and in the event of invalidity of any of such provisions the defendants intend to enforce the others of such provisions, that is to say:

(a) Defendants intend to so enforce the requirement that teachers of foreign languages shall demonstrate their proficiency in such languages, in order that children and their parents may be guarded against the waste of time and money, and the deleterious effects upon the children, attendant upon instruction by incompetent teachers.

(b) Defendants intend to so enforce the requirement that teachers of foreign languages shall demonstrate that they are reasonably well versed in the usage and idiom of the English language, if they wish to undertake the instruction of children under fifteen years of age, in order that such teachers may be able to explain properly the differences between English and the foreign language taught, thereby avoiding or minimizing the conflicts set up by the dissimilarities in the two languages.

(c) Defendants intend to so enforce the requirement that students under the age of fifteen, in order to undertake the study of a foreign language, shall have passed the fourth grade in public school or an equivalent course of study, [fol. 126] thereby avoiding or minimizing the deleterious effects of bilingual instruction at too early an age.

(d) Defendants intend to so enforce the requirement that students under the age of fifteen who have not yet passed the eighth grade and who are studying or about to undertake the study of a foreign language, may be required

to demonstrate, by a standard test as defined in chapter 31 of the Revised Laws of Hawaii 1945, that they have such proficiency in English as must be attained by other students in the same grade in order to pass in English studies in the public schools of the Territory, thereby protecting such children against failure in their basic school studies through deficiency in English.

Dated at Honolulu, T. H., this 28th day of June, 1947.

(s) Rhoda V. Lewis, Assistant Attorney General; Thomas W. Flynn, Deputy Attorney General, Attorneys for Defendants.

[fols. 127-130] Exhibit "A" to answer omitted. Printed side page 53 ante.

[fols. 131-133] Exhibit "B" to answer omitted. Printed side page 57 ante.

[fol. 134] [File endorsement omitted]

[fol. 135] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO PROCEEDINGS AND EVIDENCE—Filed August 16, 1947

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the proceedings and evidence adduced in the above entitled cause, relating to the jurisdiction of the Court, at hearings before the Honorable D. E. Metzger at Honolulu on February 21, February 26 and February 28, 1947, shall be considered to all intents and purposes and effects, the same as though such hearings had been held and evidence presented before the Court at the trial of the case beginning on June 20, 1947 and continuing until July 2, 1947; and that a transcript of such hearings and evidence shall be considered as part of the record of evidence in the case in the aforesaid trial beginning on June 20, 1947 and continuing until July 2, 1947.

[fol. 136] Dated at Honolulu, T. H., this 15th day of August, 1947.

Mo Hock Ke Lok Po, an eleemosynary corporation, Dai Kung Chinese School, an eleemosynary corporation, Chung Shan Chinese School Association, an eleemosynary corporation, Wah Chan Thom, Wilfred Chong and Leong Nget Cho, Plaintiffs, by (S.) W. Y. Char, Their Attorney. Ingram M. Stainback, C. Nils Tavares and W. H. Loper, Defendants, by Rhoda V. Lewis, Acting Attorney General, Territory of Hawaii, by Thomas W. Flynn, Deputy Attorney General, Territory of Hawaii, Attorneys for Defendants.

[fol. 137] [File endorsement omitted]

[fol. 138] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII, CIVIL ACTION

Civil No. 765

MO HOCK KE LOK PO, an Eleemosynary Corporation; DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation; Chung Shan Chinese School Association, an Eleemosynary Corporation; Wah Chan Thom, Wilfred Chong, and Leong Nget Cho, Plaintiffs,

vs.

INGRAM M. STAINBACK, NILS C. TAVARES, and W. H. LOPER, Defendants

Before Denman, Circuit Judge, and McCormick and Metzger, District Judges

OPINION—Filed October 22, 1947

DENMAN, Circuit Judge:

Plaintiffs seek a judgment declaring unconstitutional Act 104 of the Hawaiian Legislature enacted on May 1, 1943, entitled "An act regulating the teaching of languages to children," now embodied in Hawaiian Rev. Law, Chapter 31. They also seek to enjoin the defendants Superintend-

ent of Public Instruction, the Governor and the Attorney General from their enforcement of that Act.

Two of the plaintiffs are Wah Chan Thom, a Hawaiian citizen of Chinese ancestry, having three children in the public schools of Hawaii, one 13 years of age and in the seventh grade, one eight years of age and in the third [fol. 139] grade, and one three years of age, and Wilfred Chong, of the same citizenship and ancestry, having a child of thirteen in the sixth grade and one of nine in the third grade, and one of five attending kindergarten. They seek to have their children taught the Chinese language without the restrictions imposed by the challenged Act.

The remaining plaintiffs are a teacher of the Chinese langage, Leong Nget Cho, a Hawaiian citizen, and the three Hawaiian eleemosynary corporations chartered to teach and seeking to teach the Chinese language.

The evidence adduced establishes that each of the corporation plaintiffs has a matter in controversy exceeding, exclusive of interest and costs, the sum of $3,000 required by 28 U. S. C. 41 (1). As to the other plaintiffs the amended complaint has no statement as to the amount in [fol. 140] controversy. The court sua sponte notes that the jurisdictional amount of sec. 41 (1) is required of all civil suits litigating constitutional questions except those stated in the succeeding 27 paragraphs. No one of these gives the district courts jurisdiction of a deprivation of a right created by a *territorial* law, though paragraph (14) gives such jurisdiction to such a deprivation by a state law.[1]

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[1] "(14) Suits to redress deprivation of civil rights. Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, *or usage of any State*, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States. (Mar. 3, 1911, ch. 231; sec. 24, par. 14, 36 Stat. 1092)." (Emphasis supplied.)

Paragraph 1 of Civil Rights Act of April 20, 1871, 17 Stat. 13, in which the right is confined to an invasion by a statute of a *state* only. When codified in 1878 in the Revised Statute, sec. 1979, the form in which it is now cast in

It thus seems that Congress intends that a territorial invasion of the right in controversy involving less than $3,000 should have its litigation in the territorial courts.

[fol. 141] We will therefore be required to dismiss the complaint as to the plaintiffs the teacher of Chinese and the parents and children, unless within twenty days herefrom the complaint be amended to contain allegations of the required jurisdictional amounts in controversy.

The striking provision of the Act is the extraordinary definition of what constitutes a school in which a foreign language is taught. Section 1872 provides,

> "Definitions. As used in this chapter: 'School' means any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice."

The Hawaiian statute prohibits the teaching of any language other than English in such manner to *all* children who have not passed the first four grades of public or private attendance. Such attendance is required in the school year after the child has reached six years of age. (Haw. Rev. L. Sec. 1830.) This means that no parent may have his child so taught before he has attended any public school and thereafter up to ten years of age at least. It is up to a later age if for sickness or some other reason he has not

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8 U. S. C. 43, the right was redefined as including territorial statutes. However, even under the Revised Statutes the *jurisdiction* was specifically restricted to suits on *state* statutes. District Courts, R. S. 563, par. twelfth, Circuit Courts 629, par. sixteenth.

In this respect it also should be noted that the Supreme Court in Douglas v. Jeanette, 319 U. S. 157, 161, involving only a state statute, after stating the $3,000 amount need not be alleged or proved, cites R. S., sec. 1979, 8 U. S. C. 43, containing the words "or territory," as if the mere creation of the right conferred the jurisdiction. However, the Court finally places the jurisdiction on Section 41 (14) which does not contain the word territory.

then passed the fourth grade. Thereafter the child must pass *each* succeeding grade through the eighth with a score "not lower than the normal" or reach the age of fifteen be- [fol. 142] fore he may so be taught a foreign language.[2]

Since the testimony is that a very large number of Hawaiian children of fifteen seek their own living and support at that age, it is apparent that as to most of them their parents must have taught them a foreign language before that time if one is to be acquired.

Defendants claim that we should not construe the definition of a school as applying to a Chinese speaking mother who daily teaches her two children the language of the home. Assuming this true, it certainly would apply to a religious Chinese descended mother having an educated cousin teach two of her children in her home the truths of Confucious, even orally, explaining the words of that spiritual guide in the language in which they are spoken and are recorded. [fol. 143] The parents' right to have their offspring taught a foreign language is one of the fundamental rights guaranteed by the due process clause of the Fifth and Fourteenth Amendments. A teacher of such languages in a Nebraska public school to children in the eighth grade or below cannot be deprived by the state legislature of the right to pursue that vocation. Meyer v. Nebraska, 262 U. S. 390, 400. The Supreme Court reversed a judgment denying an injunction restraining state officials from enforcing the above Nebraska law against such a teacher. Nebraska District v. McKelvie sub. nom. Bartels v. Iowa, 262 U. S. 404, 411.

The Circuit Court of Appeals for the Ninth Circuit held that an injunction should be granted against the enforce-

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[2] "Sec. 1873. Requirements for pupil. No child shall be taught a foreign language in any school unless he shall comply with one of the following requirements: (a) That he shall have passed the fourth grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the department of public instruction attaining a score not lower than normal for his grade; or (b) that he shall have passed the eighth grade in public school or its equivalent; or (c) that he shall have attained the age of fifteen years. (L. 1943, c. 104, s. 3.)"

ment of a Hawaiian statute regulating foreign language schools. In so doing it based its opinion on the following statement of the natural law of the relationship of parent and child from an opinion of Mr. Justice Harlan in Berea College v. Kentucky, 211 U. S. 45, 67, 68.

> "'The capacity to impart instruction to others is given by the Almight- for beneficent purposes and its use may not be forbidden or interfered with by government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperil the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property, especially, where the services are rendered for compensation. But, even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States. This court has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces "the right of the citizen to be free in the enjoyment of all his faculties," and "to be free to use them in all lawful ways," • • • If pupils, of whatever race—certainly, if they be citizens—choose with the consent of their parents or voluntarily to sit together [fol. 144] in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether federal or state, can legally forbid their coming together, or being together temporarily for such innocent purpose.'"

Farrington v. Tokushige, 11 F. 2d 710, 713, 714. On certiorari the Supreme Court, 273 U. S. 2, 84, sustained that decision, stating (pages 298, 299),

> "• • • Enforcement of the Act probably would destroy most, if not all of them (the schools); and, certainly it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Con-

stitution protects him as well as those who speak another tongue • • •

The general doctrine touching rights guaranteed by the Fourteenth Amendment to owners, parents and children in respect of attendance upon schools has been announced in recent opinions. Meyer v. Nebraska, 262 U. S. 390; Bartels v. Iowa, id. 404; Pierce v. Society of Sisters, 268 U. S. 510, While that amendment declares that no *State* shall 'deprive any person of life, libefty or property without due process of law,' the inhibition of the Fifth Amendment—'no person shall • • • be deprived of life, liberty or property without due process of law'—applies to the federal government and agencies set up by Congress for the government of the Territory. Those fundamental rights of the individual which the cited cases declared were protected by the Fourteenth Amendment from infringement by the States, are guaranteed by the Fifth Amendment against action by the Territorial Legislature or officers."

Pierce v. Society of Sisters, 268 U. S. 510, so relied upon in the Farrington case, sustained an injunction against enforcement of an Oregon statute forbidding the general education of children in Catholic schools. In granting such an injunction to such a school corporation the Court stated [fol. 145] at page 535,

"• • • The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. Northwestern Life Ins. Co. v. Riggs, 203 U. S. 243, 255; Western Turf Association v. Greenberg, 204, U. S. 363. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over

present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. Truax v. Raich, 239 U. S. 33; Truax v. Corrigan, 257 U. S. 312; Terrace v. Thompson, 263 U. S. 197.

The courts of the State have not construed the Act, and we must determine its meaning for ourselves . . . ."

As in the case last cited, the Territorial courts of Hawaii, as the Oregon courts in the Society of Sisters case, "have not construed (the language school) Act, and we must determine its meaning for ourselves." It should be noted, however, that to the fundamental *parental right* to secure for a child a foreign language so recognized in the Berea College and the Society of Sisters cases—that is in the American isolationist period between 1909 and 1926—in today's world of the United Nations there has been added and equally profound *international need* for understanding between the peoples of a world of different tongues.

[fol. 146] The defendants contend that in so construing the Hawaiian Act it must be done in the light of the Act's legislative finding concerning a harmful condition respecting the "average" Hawaiian school child. In this connection the case of Farrington v. Tokushige, supra, recognizes, at page 299, that exceptional language conditions prevail among Hawaiian children, warranting their pedagogical control within the limits of the Constitution. The legislative finding relating to the "average" of Hawaiian children is as follows:

> "Sec. 1871. Declaration of legislative findings. It is hereby declared that the study and persistent use of foreign languages by children of *average* intelligence in their early and formative years definitely detract from their ability properly to understand and assimilate their normal studies in the English language, which are required by law to be pursued by all children of school age, and definitely retard their progress in understanding and assimilating such studies; that the study and persistent use of such foreign languages in such early and formative years may and do, in many cases, cause serious emotional disturbances, conflicts and maladjustments; that the teaching of foreign lan-

guages compels and encourages the study and persistent use of such foreign languages, to the detriment, as aforesaid, of children in their early and formative years; that it is to the best interest, and will best promote the health and welfare, of children of tender age that such foreign language studies not be undertaken until each child shall have completed and passed at least the fourth grade or shall have attained the age of nine years, unless such child is earlier able to speak, write and read the English language and has attained a test score of at least 5.0 on standard tests in composition and in reading; and that the teaching and study of foreign language to and including the eighth grade or the age of fifteen years should be regulated in the public interest to avoid the detrimental results herein set forth to which end each of the provisions of this chapter are enacted. (L. 1943, c. 104, s. 1.)"

[fol. 147] This finding regarding such "average" children is supported by the evidence. In brief, it is that in many instances Hawaiian children are required to frame their thoughts and to express them in three distinct languages. One is the language of the home, where a child, say of Portuguese parents, has all his intimate home activities in Portuguese. Another is what is called "pidgin," an extension of that lingua franca of the China, South Asiatic and Malayan coast cities in which the foreign residents conduct their personal and commercial relations with the lesser educated resident nationals. To this the Hawaiian people have added words and phrases assimilated from the Portuguese, Hawaiian, Koreans and others. The testimony is that much of the intercommunication of children from homes where a foreign language is spoken is in this pidgin and that even some teachers use it in clarifying English words to their pupils. The third language is English.

With many of the children so using the three languages, the testimony of the defendants is that there is in the sixth grade a retardation in accomplishment of the school's curriculum of over six months behind that of similar schools on the mainland. The parties dispute as to the major causa causans. Plaintiffs, while not contesting the retardation, contend that pidgin and not the language schools is the principal cause. Defendants claim it is because of the language schools.

[fol. 148] There are many Hawaiian Catholic parochial schools with complete educational courses, attendance in which is an equivalent to that of the regular public schools. The defendants state the Act interdicts the teaching of even Latin or Greek to the children of the age and scholastic standing it seeks to affect, and we agree.

Before the attack on Pearl Harbor there were large schools teaching the Chinese and Japanese languages in the afternoon, after the regular schools had adjourned. These schools ceased teaching during the war. There is testimony that all of such Japanese schools have been permanently abandoned. Their buildings were voluntarily turned over to the government or charity organizations. The Chinese school plaintiffs now seek to resume such late afternoon teaching.

The extent of the education of children in the Chinese language prior to the war with Japan is shown by the admission of the defendants' answer that there were eight such schools employing more than fifty teachers. It is a proper inference that the three plaintiff schools seeking to resume teaching will have many pupils of above the average intelligence of the legislative finding.

The Act with its finding and prohibitory provisions shows on its face a denial of the right to acquire a foreign language to that half, or nearly half, of Hawaiian children of more than "average intelligence." Reinforcing this is the testimony of defendants' principal pedagogical expert that some [fol. 149] children from homes speaking a foreign language "are so far behind the others that if our teachers are to have a chance to bring them up to standard, up to standard of the mainland, they can't have the additional handicap of trying to learn another language or else they will never —or else too many of them will never speak good English. *Of course, the bright ones will.* But the children who are *about* the average, *about half of the children in any group are below average,* so they can't do it with that. * * *" (Emphasis supplied.)

In Hawaii there were 22,357 children in the first four grades. Construing the word "average" in its customary meaning as being derived from those above and below a standard, of these at least 10,000 above average intelligence, the brighter ones, are denied the right then to begin to acquire a foreign language even with a tutor at home.

We do not agree with the defendants that such a denial to the parents of such a large proportion of children of the constitutional right to secure a foreign language for them is warranted to secure the elimination of the harm it seeks to avoid for those of lesser ability. It is for the brighter ones that there is the greater gain in such attainment—a gain not only in personal mental growth and satisfaction and in increased business opportunities but, now, in opportunities in service to his government's need of foreign language experts in its international intercourse.

[fol. 150] Where such a fundamental right is destroyed by statute, it is not incumbent upon the wronged party to show that it could have been drawn so as to prevent the evil sought to be cured in the conduct of others. Thornhill v. Alabama, 310 U. S. 88, 99, and cases there cited. Hence we are not required to explore the area of legislation in which pedagogical standards may be created by which these children of average and less than average intelligence could be segregated from the others and such prohibitory restraint applied to them.

While it is apparent that the three plaintiff schools will have pupils of above such average intelligence and hence would be deprived of their constitutional right, its fundamental character gives them the right to contest the legislation even if they were not shown to be about to teach such pupils. It is enough that the statute shows on its face such an invalid deprivation. Thornhill v. Alabama, supra 101; Lovell v. Griffin, 303 U. S. 444, 452; Smith v. Cahoon, 283 U. S. 553, 562; Schneider v. State, 308 U. S. 147, 161.

There is no merit in defendants' contention that under the saving clause of the statute [3] it is inapplicable to plain-[fol. 151] tiffs or that it contemplates an enforcement only against children of average intelligence. It applies to *all* persons systematically teaching two pupils and to *all* children as well as those of average or less than average intelligence. Its provisions are not divisible in either of these essential respects.

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[3] "Section 7. (Saving Clause.) If any portion of this Act, or the application thereof to any person or circumstance, shall be held to be unconstitutional or invalid, the remainder of this Act, or the application of such portion to other persons and circumstances, shall not be affected."

We hold and declare the statute to violate the due process clause of the Fifth Amendment and order the issuance of the injunction prayed for.

(s) William Denman, United States Circuit Judge;
Paul J. McCormick, United States District Judge;
Delbert E. Metzger, United States District Judge.

[fol. 152] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII

Civil Action

[File endorsement omitted]

Civil No. 765

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an eleemosynary corporation, Chung Shan Chinese School Association, an eleemosynary corporation; Wah Chan Thom, Wilfred Chong and Leong Nget Cho, plaintiffs,

vs.

INGRAM M. STAINBACK, C. NILS TAVARES AND W. H. LOPER, Defendants

OPINION OF THE COURT RE APPLICABILITY OF SECTION 266 JUDICIAL CODE OF THE UNITED STATES—Filed October 22, 1947

McCORMICK, District Judge:

By the amended complaint in this action, three eleemosynary corporations duly organized for the purpose of conducting schools in the Territory of Hawaii for the education of children in the Chinese language, a pursuit they had been lawfully carrying on long prior to certain territorial legislation in part embodied in the Revised Laws of Hawaii, 1945, as Chapter 31, jointly with three personal plaintiffs, citizens of the United States of Chinese lineage and residents of the Territory of Hawaii seek an injunction to restrain appropriate territorial executive officers from enforcing provisions of Chapter 31, upon the ground that the questioned territorial legislation is unconstitutional

and violative of the plaintiffs' liberty and property without due process of law in contravention of the 5th Amendment.

[fol. 153] Subsequent to the denial of plaintiffs' motion for a preliminary injunction by the District Judge presiding at the time and pursuant to the request of the plaintiffs stated in the amended complaint and confirmed in open court by the express desire of defendants, three accredited federal judges designated by District Judge Metzger, before whom the cause was then pending, assembled to finally hear and determine the suit in the District Court established in the Territory of Hawaii by Sec. 86 of the Hawaiian Organic Act, as amended. Title 48, Sec. 641, et seq., U. S. C. A.

At the outset of proceedings the suggestion was made that the three judge procedure in the federal courts is not applicable to the District Court established by Congress in the Territory of Hawaii and was therefore inoperative in the instant suit. Such suggestion poses an important and crucial question in the case at bar, namely, whether Sec. 266 of the Judicial Code of the United States, as amended, Title 28, Sec. 380, U. S. C. A., is applicable in the District Court in the Territory of Hawaii. We are of the opinion that it is applicable to the situation before the Court in the suit at bar.

The Supreme Court had before it in *Farrington* v. *Tokushige*, 273 U. S. 284 (1927) a situation to an extent similar to the instant proceeding in that there was involved an application for an interlocutory injunction to restrain territorial executive officers of Hawaii from attempting to enforce a Hawaiian territorial legislative act relating to foreign language schools. In that case, the Court impliedly decided that the District Judge had jurisdiction to hear and determine the right to an interlocutory injunction. However, even if it be assumed that the three judge requirement in Section 266 of the Judicial Code was thereby [fol. 154] held to be not applicable to the proceedings in the District Court in Hawaii there under consideration, we think such conclusion does not solve the problem before us at this time.

Here we are dealing with the Statute as Amended, 43 Stat. 938, which in pari materia states

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such

> suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

And here we must also consider the question in the light of procedural innovations specifically established and currently relating to the district court of the United States for Hawaii. Title 48, Sec. 646, U. S. C. A.

Support of the argument of inapplicability of the three judge "procedural protection" against single judge injunctive process in the district court of Hawaii is predicated upon decisions pertaining to judicial procedure in Puerto Rico. *Benedicto v. West India & Panama Telegraph Co.* (C. C. A. 1, 1919), 256 Fed. 417; *Munoz v. Porto Rico Ry., Etc. Co.* (C. C. A. 1, 1936), 83 Fed. (2) 262. We think there is a wide difference between the basic governmental structure and identity of Hawaii and Puerto Rico. In the latter "possession" only certain statutory laws of the United States are applicable therein, Title 48, Sec. 734, U. S. C. A. whereas in the "territory" of Hawaii, The Constitution, and all the laws of the United States which are not locally inapplicable, are effective identically as "elsewhere" in the United States. Title 48, Sec. 495, U. S. C. A.

Indeed, the clear and basic governmental differences in the two political units and in their respective judiciaries is recognized as far back as 1919 where the Court of Appeals in the Benedicto decision stated:

> [fol. 155] "We have no occasion to inquire whether Section 266 might not apply to continental territories more closely related to the United States than that of the possession or quasi territory of Puerto Rico."

Moreover, the Supreme Court in *Balzac v. Porto Rico*, 258 U. S. 298, and in *Downes v. Bidwell*, 182 U. S. at p. 305, so conclusively distinguishes the governmental characteristics of Puerto Rico and of Hawaii as to make the decisions relating to courts in Puerto Rico of no application whatever to the question under consideration in this Court.

All pertinent adjective prerequisites specified by the Supreme Court in *Ayrshire Collieries Corp. v. United States*, decided April 28, 1947, and in *Farrington v. Tokushige*, supra, necessary to make operative three judge participation in the instant suit have occurred. An interlocutory injunction has been sought and passed to a hearing in the

District Court at Honolulu and a substantial federal question of transcending limitations of the 5th Amendment to the Constitution has been sufficiently alleged in the Amended Complaint.

In our opinion, discussion of any different elements between "constitutional" and "legislative" courts is entirely beside the point of our inquiry and is a mere abstraction.

The suit at bar from its inception has been at all times in the same forum, namely in the District Court established in the Territory of Hawaii by the Congress of the United States. The jurisdiction of such Court, in the sense of its right and power to hear and determine causes and proceedings has been explicitly stated by the creative authority to be that of "district courts of the United States," no more and no less, and it is expressly required by Statute to proceed in the same manner as a United States District Court. Title 48, Sec. 642, U. S. C. A.

[fol. 156] Undoubtedly, a statute which departs from the procedure traditionally employed in single judge tribunals, as Section 266 of the Judicial Code does, should in applicable situations be given "narrowness of scope", *Phillips v. United States*, 312 U. S. 246, at p. 251, and must be construed "as an enactment technical in the strict sense of the term and to be applied as such "but if it be admitted, as it must, that the District Court in Hawaii has jurisdiction to consider and decide suits seeking to have territorial legislative acts declared unconstitutional, it does violence to the Congressional intent, if not to the words used in the last sentence of Amended Section 266, to hold that the federal district judges in Hawaii have prerogatives and larger powers to enjoin statutes of general application in the sensitive local area involved than those of other federal courts. We think such construction is not imperative and in the light of the language used, and the manifest congressional intent, it should be avoided.

Nor do we think that there is any need to philosophize or surmise why Congress in dealing with situations in Hawaii, invested or restricted Courts which it continued or established there, or which it established in other territories of possessions of the United States, with dissimilar procedural methods in disposing of injunction applications which seek to restrain the operation or enforcement of territorial Statutes upon the ground of repugnancy to the Constitution of the United States. There can be no doubt that

Congress has paramount and plenary authority to legislate in all matters appropriate to the people of the territory of Hawaii—*Inter-Island Co. v. Hawaii*, 305 U. S. 306.

If there had been any reason in the *Farrington v. Tokushige litigation* to doubt that the intent of Congress that [fol. 157] the scope and composition of the District Court of the United States for Hawaii should be, with relation to provisional or final remedies in suits for injunction to restrain local legislation upon the ground of unconstitutionality, the same as in Federal District Courts throughout the States, the uncertainty has been expressly and clearly removed by subsequent specific Congressional legislation, Title 48, Section 646, U. S. C. A., F. R. C. P. 1, 65 (e).

There being no authoritative ruling to the contrary, there is sound reason to conclude that the "mischief" which Congress sought to remedy by enacting and amending Section 266 of the Judicial Code impends in Hawaii similarly as it does in the States.

The chief obstacle to applying the "procedural protection" of Section 266 of the Judicial Code to Hawaii appears to be the repetitive use of the word "State" in the Statute. But we think that when the civic aspects of the situation are considered, the "procedural protection" of the public interest in the mind of the law-making agency connotes a meaning of any separate political community such as the Territory of Hawaii as well as those political subdivisions of the Nation known as States of the Union.

In *Talbot v. Silver Bow County*, 139 U. S. 438 (1890) the Supreme Court had occasion to interpret the meaning of the word "State" in an act of Congress relating to the right of the Territory of Montana to assess a tax on National Bank Stock—whereas under the literal terms of the Act in question, only "States" were given authority to tax such stock.

In holding that the territories possess the same power of taxing National Banks which States enjoy the Court said:

> [fol. 158] At page 441: "In this section no express reference is made to Territories; States only are mentioned. Tested by the letter, the argument is short and clear. Congressional permission is essential; no permission is given to the Territories; therefore, Terri-

torial taxation is unauthorized and void. Whatever may be the voice of the letter, the argument fails because the minor premise cannot be sustained. Can it be that Congress meant to give power to the States to tax, and to withhold that power from the Territories? Some plausible reason should be suggested before the intention is imputed to Congress of granting to an independent jurisdiction, such as a State, the power to tax one of its own instramentalities, and at the same time withholding a like power from a political organization like that of a Territory wholly dependent upon Congress, and subject to its absolute supervision and control. Such is not the ordinary lesson of experience. If the matter in respect to which such an intent was imputed were wholly of interest to the States, or designed purely for the exercise of powers within the States then properly all general expressions in the statute might be limited to States, and the intent of Congress be supported and established by the character of the subject-matter of the legislation." The converse of this is true. The national banking system was national in its design, coextensive in its operation with the territorial limits of the United States, and intended to be the banking system for the whole country, Territories as well as States."

When we examine the several provisions of the Organic Act of Hawaii relating to the District Court, its jurisdiction, grant and limitation of powers, manner of appeals therefrom and the concomitant Rules of Federal Procedure operative therein, we perceive a unitary judicial system functioning, except as to tenure of the Judges, precisely as in the several States, and we conclude in line with the reasoning of the Court in the *Talbot* case, that the word "State" in Section 266 of the Judicial Code, as amended, is not intended by Congress as in contradistinction to the Territory of Hawaii but on the contrary the requirement respecting the presence of three judges is mandatory in the [fol. 159] suit at bar in the District court of the United States for Hawaii.

It is so ordered—

——, United States Circuit Judge; (s) Paul J. McCormick, United States District Judge; Delbert E. Metzger, United States District Judge.

[fol. 160] DISSENTING OPINION

DENMAN, Circuit Judge, dissenting:

The question here is whether Congress in enacting Judicial Code Section 266, as amended 28 U. S. C. 380, conferred on the territorial district courts created by it in Hawaii and Alaska the jurisdiction to act as three-judge tribunals in suits to enjoin territorial officers from enforcing territorial laws alleged to violate the Federal Constitution.

I dissent from the court's holding that Congress gave jurisdiction in such cases under Section 266 to its territorial courts. The Supreme Court in a series of decisions, culminating in Phillips vs. United States, 312 U. S. 246, 248 et seq., holds that Section 266 is not "a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." It is there stated that that section is to be construed to avoid "a serious drain upon the federal judicial system *particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice.*" (Emphasis supplied.) Unless it be strictly construed, "Section 266 would defeat the purposes of Congress, as expressed by the Jurisdictional Act of February 13, 1925, to keep within narrow [fol. 161] confines our appellate docket... Moore v. Fidelity & D. Co., 272 U. S. 317, 321 * * *"[1]

[1] So also in the recent case of Ayrshire v. United States, 91 L. ed. 1066, 1069 (April 28, 1947), where under an analogous three judge statute, three judges heard and had submitted to them the merits of the case. Because of illness, but two participated in the subsequent decision. Applying the rule of strict technical construction of the Phillips case the Supreme Court reversed, holding that the statute required that the cause not only should be heard but that it should be determined by three judges.

Other cases of strict construction of such a three-judge statute are Gully v. Interstate Nat. Gas Co., 292 U. S. 16, 18; Oklahoma Gas & E. Co. v. Oklahoma Packing Co., 292 U. S. 386; Moore v. Fidelity & Deposit Co., 272 U. S. 317; Smith v. Wilson, 273 U. S. 388; Ex parte Collins, 277 U. S. 565; Ex parte Williams, 277 U. S. 267; Ex parte Public National Bank, 278 U. S. 101; Rorick v. Everglades Drainage Dist., 307 U. S. 208; Ex parte Bransford, 310 U. S. 354.

Briefly summarized, my dissent is to the court's failure to give a strict interpretation of Section 266 to the end that it will minimize the drain on the service to litigants of federal judges in drawing them to distant places and away from their resident courts and "keep within narrow confines . . . (the Supreme Court's) appellate docket."

No case could better than this illustrate the drain on federal judicial power in taking judges to distant regions. District Judge McCormick and myself in travel to and from Hawaii in the trial and subsequent conferences have been taken for several weeks from our needed services to our litigants in our respective courts. Also Judge Metzger spent several weeks in travel from Hawaii to and from San Francisco and in necessary conferences with us on the mainland. One of Hawaii's two district judges, Judge McLaughlin, was disqualified, thus requiring the calling from the main-[fol. 162] land of Judge McCormick to complete a three-judge tribunal. Judge McCormick's court in the Southern District of California is so overcrowded with litigation that the Ninth Circuit Conference at its meeting in July 1947 requested of Congress that another judgeship be created for that district.

The court's opinion in so failing to apply the rule of the Phillips case has caused it (a) to insert in Section 266 the words "or territory" after its eleven words "state" and (b) to construe the words "district court of the United States" not in their strict historical meaning as a constitutional court but to expand the phrase broadly to include territorial courts.

Particularly I disagree with this court's interpretation of the phrase "such suit" of the terminal clause of Section 266, cited in the fifth paragraph of its opinion. When the pertinent omitted portions of the section are included, the only questions here for consideration are made clear. That section provides

> "(Judicial Code, section 26, amended.) Same; alleged unconstitutionality of State statutes; appeal to Supreme Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an admininstrative board or com-

mission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any [fol. 163] circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges; Provided, however, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: '. . . It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

3. *The word "state" as used in Section 266 should be given a strict interpretation as applying to states in their sovereign capacity and hence not including such Territories* [fol. 164] *as Hawaii and Alaska.*

The phrase "such suit" of the terminal clause of Section 266 refer to suits concerning action of a "state" as that word is used in its preceding eleven phrases:

1. "Statute of a state"
2. "Officers of such state"
3. "Pursuant to the statutes of such state"
4. "To the governor and to the attorney general of the state"
5. "Court of the state having jurisdiction thereof"
6. "Under the laws of such state"
7. "A stay in such state courts"
8. "Such state court"
9. "The Courts of the state"
10. "The attorney general of the state"
11. "The suit in the state courts"

Nothing could be further from a strict construction of these phrases than this court's decision which requires the addition of the words "or territory" to each of them.

Entirely apart from this violation of the rule of strict construction of the Phillips and other cases, supra, the Mann Elkins Act of 1910 (36 Stat. 539 et seq.); in which, in Section 17, Congress created the first functioning of the three-judge court of later Section 266, shows the contrary intent in its phraseology. In Section 17 the word "territory" does not appear. Elsewhere in that Act, in Sections 7, 11 and 12, the word "territory" is used in connection with the word "state" wherever that Act includes a territory within its provisions.

This court's opinion explains its disregard of the rule of strict construction of the Phillips case by stating that "the *mischief* which Congress sought to remedy by enacting and amending Section 266 of the Judicial Code im- [fol. 165] pends in Hawaii similarly as it does in the States." The Supreme Court disposed to the contrary a similar contention with respect to Section 266 in Ex parte Collins, 277 U. S. 565, 567. There was the same claimed unconstitutional " chief" in the enforcement by municipal officers of a state statute. It was claimed, as here,

that the words officers of a state should be given a broad meaning to include officers of a municipality of *a state*. The contention was rejected by the Supreme Court stating "The suit is not one to restrain 'the enforcement, operation, or execution' of a statute of a State within the meaning of Section 266. That section was intended to embrace a limited class of cases of special importance and requiring special treatment in the interest of the public." It is the action of a state in its *sovereign* capacity and not the action of lesser political subdivisions, such as counties, municipalities, and, here, territories, which lack such sovereign capacity, with which Section 266 is concerned. The Court, at page 567, quotes and relies upon what Senator Burton said of the amendment to the Commerce Court Act which later became Section 266: "It evidently recognizes the superior degree of consideration and sanction which should be given to a state statute, and prevents hasty interference with the action of a sovereign state." 45 Cong. Rec. 7253.

It is obvious that many municipalities created by state legislatures have a larger population and greater property than the Territory of Hawaii. The mischief of unconsti-[fol. 166] tutional action well could be greater when caused by such municipal officers than that by the territorial officers. Yet, the Supreme Court says (p. 568), "Despite the generality of the language, we think the section must be so construed" that it does not apply to the acts of officers of a state's municipality.

In view of the Phillips case it is unnecessary to review the many cases in which statutes containing the word "state" have been broadly or narrowly construed. A broad construction of the word "state" was given in the early decision of Talbot v. Silver Bow County, 139 U. S. 438 (1891), the sole case relied upon in this respect in this court's opinion. There it was held to include the Territory of Montana in a statute giving states the power to assess a tax upon national bank stock.

In contrast, in a strict interpretation of the word "state," is the subsequent decision of Wynne v. United States, 217 U. S. 234, 242. There the Supreme Court held that the Territory of Hawaii was not included in the word "state" in a statute (R. S. 5339) providing for jurisdiction in federal courts in cases of murder committed within the "ad-

miralty and maritime jurisdiction of the United States, and outside of the jurisdiction of any particular state." The defendant in that case was tried in this court and found guilty of murder committed on a vessel while at anchor in Honolulu Harbor. The Supreme Court held that under this [fol. 167] statute the word "state" did not include the Territory of Hawaii and that the harbor of Honolulu was outside the jurisdiction of any state.

The holding in the Wynne case is of greater significance because it distinguishes the liberal interpretation of the word "state" in the Silver Bow County case, stating that that decision "was based upon the obvious intent of Congress, looking to the scope and purpose of the act," whereas the Congressional intent of R. S. 5339, providing for the jurisdiction of this particular territorial court, is given a strict interpretation of the word "state" as excluding the Territory of Hawaii.

In accord with the decision of Ex parte Collins that section 266 is confined to unconstitutional actions by states in their sovereign capacities and does not include the action of lesser political subdivisions, such as distant island territories, is the decision of the First Circuit in Benedicto v. West Indian & Panama Telegraph Co., 256 Fed. 417. There the court held that Section 266 has no application to the issuance of an interlocutory injunction restraining the enforcement upon constitutional grounds of an order of the Public Service Commission of Puerto Rico. The reasoning of the court is that the maintenance of the relationship of the states, as "independent sovereignties," to the United States is the purpose of this legislation. As stated by the court at page 419,

[fol. 168] "We think the leading idea of Congress was in deference to the supposed independent jurisdiction of states, as such, and to safeguard their laws against hasty and inconsiderate federal interference."

Again quoting the court at page 419,

"• • • we think the provision in respect to three judges (Section 266) has reference to state statutes and Constitutions, because of the independent and peculiar relationship of the states to the federal government, and not to Porto Rico, and because the administration there of the three-judge provision would be locally inconvenient and practically inapplicable; and

because it is not clear that Congress intended that interlocutory injunction questions should require the presence of three judges in primary equity proceedings in that Island:"

B. *The strict construction of the Phillips case requires the words of Section 266 "district court of the United States" to be confined to constitutional district courts in the states and not to be liberally extended to include territorial district courts.*

This court's opinion contends that because Congress in 48 U. S. C. 642 has given the district court of the Territory of Hawaii the same jurisdiction and powers as the constitutional courts in the states, the two classes of courts are in all respects identical. It ignores the contention, and cases supporting it, vigorously presented to us by the brief of the Bar Association of Hawaii,[2] that such identity of [fol. 169] jurisdiction and powers does not make a territorial court a constitutional court.

Even in the absence of the established strict construction for Section 266 and considering the question de novo, the phrase "district courts of the United States" *without an addition expressing a wider connotation* does not include territorial courts.

Mookini v. United States, 303 U. S. 201, 205, was decided thirteen years after Congress enacted the present terminal clause of Section 266 upon which this court bases its opinion. There the question was whether the territorial court of Hawaii is included in the term "district courts of the United States". The Supreme Court held it was not, stating

"The term 'District Courts of the United States,' as used in the rules, *without an addition expressing a*

[2] The court requested the Bar Association to act as amicus curiae and brief for us the law with respect to the applicability of Section 266 to the territorial district courts. In response a very able brief was prepared and presented to us by the Association's president Mr. J. Russell Cades, and Mr. Edward Z. Buck. The brief, which covered much more of the historical development of Section 266 than does this dissent, has been of great assistance to its writer, who agrees with the argument and conclusions of these friends of the court.

wider connotation, has its historic significance. It describes the constitutional courts created under Article III of the Constitution. Courts of the Territories are legislative courts, properly speaking, and are not District Courts of the United States. We have often held that vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a 'District Court of the United States.' Reynolds v. United States, 98 U. S. 145, 154; The City of Panama, 101 U. S. 453, 460; In re Mills, 135 U. S. 263, 268; McAllister v. United States, 141 U. S. 174, 182, 183; Stephens v. Cherokee Nation, 174 U. S. 445, 476, 477; Summers v. United States, 231 U. S. 92, 101, 102; United States v. Burroughs, 289 U. S. 159, 163 * * *."

So also the Territory of Alaska. In its enabling Act of 1884 the Alaska district court was given "the civil and criminal jurisdiction of district courts of the United States." One McAllister, appointed to the Alaska district court by and with the consent of the Senate was removed [fol. 170] by President Cleveland under a statute (R.S. 1768) giving him the power to suspend any civil officer so appointed "except judges of the courts of the United States." McAllister sued for his salary claiming that he remained in office because the district court of the Alaska territory is one of "the courts of the United States," from which he could not be so suspended by the President. In McAllister v. United States, 141 U. S. 174, the Supreme Court denied him his salary. It held that, although the Alaska court was "invested with the powers of a district court and a circuit court of the United States, as well as with general jurisdiction to enforce in Alaska the laws of Oregon." (p. 179), it was not one of the "courts of the United States" since that phrase was used in Section 1768 "with reference to the recognized distinction between courts of the United States and merely territorial or legislative courts" (p. 185).

This court of three judges should have held that Section 266 gave it no power to proceed with the instant litigation. The case should have been tried by a single judge as in the case of Farrington v. Tokushige, 273 U. S. 284, where a similar Hawaiian school law was held unconstitutional. While the question of jurisdiction of the single judge was

not raised in that case, I am of the opinion that no error of the Supreme Court in that regard lurked in its record.

[fol. 171] Since the court's decision, at least for the time being, is the law of the case, I am required by the Ayrshire case, supra, to participate in the adjudication of the merits of the challenge of the constitutionality of the territorial statute.

(S.) William Denman, United States Circuit Judge.

[fol. 172] [File endorsement omitted.]

[fol. 173] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION OF FACTS—Filed December 4, 1947

It is stipulated by and between plaintiff Leong Nget Cho, by his attorneys, and defendants herein, by their attorneys, that as to said plaintiff Leong Nget Cho, the amount in controversy herein exceeds the sum of $3,000.00, exclusive of interest and costs.

Dated at Honolulu, T. H., this 2nd day of December 1947.

W. Y. Char & A. L. Wirin, Attorneys for Plaintiffs, by (S.) W. Y. Char. Rhoda V. Lewis, Assistant Attorney General; Thomas W. Flynn, Deputy Attorney General, Attorneys for Defendants, by (S.) Thomas W. Flynn.

[fol. 174] [File endorsement omitted]

[fols. 175-176] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AMENDMENT TO AMENDED COMPLAINT—Filed December 4, 1947

Leave of Court being first had, the plaintiffs file this Amendment to the Amended Complaint, said Amendment to contain the following as added to the Amended Com-

plaint, at the end of Paragraph XVII of said Amended Complaint on page 9 thereof, and before Paragraph XVIII:

The amount in controversy herein between plaintiff Leong Nget Cho and the defendants exceeds the sum of $3,000.00, exclusive of interest and costs.

W. Y. Char & A. L. Wirin, Attorneys for Plaintiffs, by (S.) W. Y. Char.

Duly sworn to by Leong Nget Cho. Jurat omitted in printing.

[fol. 177] [File endorsement omitted]

[fol. 178] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AND ORDER—Filed January 19, 1948

Defendant C. Nils Tavares, having resigned as Attorney General of the Territory of Hawaii, and Walter D. Ackerman, Jr., being as of the date hereof the duly appointed, qualified and acting Attorney General of the Territory of Hawaii, it is hereby stipulated by the undersigned that, without prejudice to the proceedings already had herein, Walter D. Ackerman, Jr., as Attorney General of the Territory of Hawaii may be substituted herein as a defendant in place of C. Nils Tavares, that all of the pleadings, proceedings and orders heretofore entered herein shall be deemed to have been filed, made or applied (as the case may be) to the said substituted defendant Walter D. Ackerman, Jr.

[fol. 179] Dated at Honolulu, T. H., this 16th day of January 1948.

W. Y. Char & A. L. Wirin, by W. Y. Char, Attorneys for Plaintiffs, (S.) Walter D. Ackerman, Jr., Attorney General, Territory of Hawaii.

It is so ordered. January 19, 1948. (S.) D. E. Metzger, Judge of the above entitled Court.

[fol. 180] IN THE DISTRICT COURT OF THE UNITED STATES

[File endorsement omitted]

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 24, 1948

The above entitled cause came on regularly for trial in the above entitled court on June 26, 1947, and continued thereafter on June 27, 28, 30 and July 1, 1947, before the Hon. William Denman, Circuit Judge, Hon. Paul J. McCormick, District Judge, and Hon. Delbert E. Metzger, District Judge, sitting as a three-judge court pursuant to Judicial Code, Section 266 (28 U. S. C. 380), Nicholas W. Y. Char, Esq. and A. L. Wirin, Esq., appearing as attorneys for plaintiffs, and Rhoda V. Lewis, and Thomas W. Flynn, Esq., appearing as attorneys for defendants, and oral and documentary evidence having been introduced on behalf of all parties, and the court have considered the same and heard the arguments of counsel and being full- advised, makes the following

Findings of Fact:

1. The plaintiffs, Mo Hock Ke Lok Po, Dai Kung Chinese School, and Chung Shan Chinese School Association are eleemosynary corporations incorporated under the laws of the Territory of Hawaii. The plaintiffs were incorpo- [fol. 181] rated for the sole purpose of conducting schools for the education of children in the Chinese language and they have been conducting the same long prior to the enactment of Act 104 of the Hawaiian Legislature, enacted May 1, 1943, and they are now prepared to resume conducting said schools which were closed during the last World War.

The plaintiff Leong Nget Cho is a citizen of the United States and a resident of the Territory of Hawaii.

2. The defendant, Ingram M. Stainback, is the duly appointed, qualified and acting Governor of the Territory of Hawaii; the defendant, C. Nils Tavares, is the duly appointed, qualified and acting Attorney General of the Territory of Hawaii; and the defendant, W. H. Loper, is the duly appointed, qualified and acting Superintendent of Public Instruction of the Territory of Hawaii. Each of

said defendants is a resident and citizen of the Territory of Hawaii.

3. During the regular session of the Legislature of the Territory of Hawaii held in the year 1943, there was passed an act designated "Act 104" duly approved on the 1st day of May, 1943, entitled "An act regulating the teaching of languages to children." Said Act is embodied in the Revised Laws of Hawaii of 1943 as Chapter 31.

4. A controversy exists between the plaintiffs and the defendants pertaining to the constitutionality of said statute both on its face and as applied. Said defendants threaten to, and intend to, enforce said statute against the plaintiffs, unless enjoined from so doing by order of this court.

The plaintiffs herein seek judgment declaring their rights in the premises, and adjudging said Act to be unconstitu- [fol. 182] tional; and seek further an injunction against the defendants, restraining the enforcement of said Act by them. The matter in controversy as to each of plaintiffs, other than Wah Chan Thom and Wilfred Chong, exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

5. No controversy amounting to Three Thousand Dollars ($3,000.00) exists as to Wah Chan Thom and Wilfred Chong and the defendants.

6. Plaintiff, Mo Hock Ke Lok Po, is an incorporated association operating the Chinese school known as Mun Lun Chinese School, which was founded in 1907. There are 36 members of said incorporated association. Said incorporated association employed 27 teachers prior to December 7, 1941. Since that date and up to April, 1946, the school closed and permitted its premises to be occupied temporarily by the United States Army as offices. Prior to the closing of the school there were 1,100 pupils attending the school, of whom 160 were in the first grade and 150 were in the second grade. The said incorporated association is the owner of property worth $100,000.00.

7. The plaintiff, Chung Shan Chinese School Association, was founded in the year 1911 and was duly incorporated under the laws of the Territory of Hawaii as an eleemosynary corporation in 1920. After December 7, 1941, and up to October 1946, the school premises owned by said plaintiff

were occupied by the United States Army. Prior to December 7, 1941, there were 850 students attending the school, of whom 120 were in the first grade and 120 were in the second grade. The said corporation is the owner of property worth about $85,000.00.

8. The plaintiff, Dai Kung Chinese School, operated a Chinese language school prior to December 7, 1941.

[fol. 183] 9. By virtue of the passage of Act 104 and its enforcement as threatened by the defendants, each of said plaintiff schools will be irreparably damaged in excess of $3,000.00, exclusive of interest.

10. The plaintiff, Leong Nget Cho, is a citizen of the United States and a resident of the Territory of Hawaii. He was born in the Territory of Hawaii but went to China at approximately 6 years of age, where he acquired a thorough knowledge of the Chinese language. Thereafter he returned to the Territory of Hawaii where he has been a resident ever since for approximately 30 years.

His occupation has been that of a teacher of Chinese in Chinese language schools, and for more than 20 years he has been employed by the Chung Shan Chinese School Association. He has no other occupation. He is not well versed in the usage and idiom of the English language; he does not desire to submit to an examination pertaining to the English language by the board of examiners as provided in Section 3 of Act 104.

11. The plaintiff, Leong Nget Cho, was able to secure a contract to teach Chinese at the Chinese language school owned by the plaintiff Chung Shan Chinese school Association in 1943 at a salary of One Hundred Dollars ($100.00) per month for a period of three years. But due to the passage of Act 104 he has not been able to pursue this position nor to obtain any other work in his profession. By virtue of the enactment of Act 104 and its enforcement as threatened by defendants, he will be irreparably damaged in a sum in excess of $3,000.00, exclusive of interest and costs.

12. In the public schools of Hawaii, foreign languages are not taught to any children under the age of 15, though [fol. 184] it be the desire of the parents of such children that they learn foreign languages.

13. In the Territory of Hawaii there are some 22,357 children in the first four grades of its schools. That of this number at least 10,000 are above the average in intellectual ability referred to in the legislative finding in Act 104 of the Hawaiian Legislature of May 1, 1943. They are the brighter ones, for whom the learning of a foreign language prior to their sixth year of age or prior to their completion of the fourth year of instruction in the Hawaiian public schools will cause no detriment to them in their general education, their health, or otherwise.

14. The plaintiff schools have in the past taught children of such above the average intelligence and will teach such children hereafter. There is no pedagogical or other reason why such above the average children should be prohibited from being taught Chinese in the plaintiff schools.

From the above facts the court makes the following

Conclusions of Law:

1. It is not necessary to decide the plaintiffs' contention that the legislature of Hawaii has no power to deny to any child the right to acquire a foreign language in his infancy.

2. Act 104 of the Hawaiian Legislature, enacted May 1, 1943 (Chap. 31, Revised Laws of Hawaii, 1943), deprives the parents of such 10,000 or more above the average children of their right to have them taught a foreign language and the plaintiffs' schools and plaintiff Leong Nget Cho of their right to teach such children the Chinese lan-[fol. 185] guage, and thereby violates the Fifth Amendment of the Constitution of the United States. Such wrongful deprivation of the rights of such a large portion of the children and parents sought to be controlled by the Act so frustrates its purposes that none of its provisions is enforcible.

3. The plaintiff schools and Leong Nget Cho are entitled to a permanent injunction against the defendants prohibiting the enforcement of Act 104 of the Hawaiian Legislature enacted May 1, 1943.

4. The complaint must be dismissed as to plaintiffs Wah Chan Thom and Wilfred Chong for lack of jurisdiction in this court.

5. The clerk of the court is ordered to enter a decree in accordance with these Findings of Fact and Conclusions of Law.

(S.) William Denman, United States Circuit Judge.
Paul J. McCormick, United States District Judge.
Delbert E. Metzger, United States District Judge.

[fol. 186] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII

Civil Action

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, Chung Shan Chinese School Association, an Eleemosynary Corporation, War Chan Thom, Wilfred Chong, and Leong Nget Cho, Plaintiffs,

vs.

INGRAM M. STAINBACK, NILS C. TAVARES, and W. H. LOPER, Defendants

JUDGMENT—Filed January 24, 1948

The above entitled cause came on regularly for trial in the above entitled court on June 26, 1947, and continued thereafter on June 27, 28, 30 and July 1, 1947, before the Hon. William Denman, Circuit Judge, Hon. Paul J. McCormick, District Judge, and Hon. Delbert E. Metzger, District Judge, sitting as a three-judge court pursuant to Judicial Code, Section 266, (28 U. S. C. 380), Nicholas W. Y. Char, Esq., and A. L. Wirin, Esq., appearing as attorneys for plaintiffs, and Rhoda V. Lewis, Esq., and Thomas W. Flynn, Esq., appearing as attorneys for defendants, and oral and documentary evidence having been introduced on behalf of all parties, and the court having considered the same and heard the arguments of counsel and cause having been submitted for decision, and the court having heretofore made and caused to be filed its Findings of Fact and Conclusions of Law,

It is ordered, adjudged, and decreed that:

1. The complaints of Wah Chan Thom and Wilfred Chong are dismissed.

[fol. 187] 2. Plaintiffs, Mo Hock Ke Lok Po, Dai Kung Chinese School, and Chung Shan Chinese School Association, are entitled to teach foreign languages in their schools to students, regardless of whether said students have or have not passed any grade in the public schools or its equivalent, and regardless of whether said students have or have not passed any tests in English composition or reading, and regardless of the age of said students.

3. Plaintiffs, Mo Hock Ke Lok Po, Dai Kung Chinese School, and Chung Shan Chinese School Association, are entitled to hire as teachers to teach their students, regardless of age, foreign languages without said teachers having been examined or certified by a Board of Examiners as to their versatility in the usage or idiom of either the English language or the foreign language or languages taught by said teachers.

4. Plaintiff, Leong Nget Cho, is entitled to follow his profession as a teacher of foreign languages and to teach children, regardless of their age, without having been examined or certified by a Board of Examiners as to his versatility in the usage or idiom of either the English language or the foreign language or languages he teaches.

5. Defendants are enjoined from interfering with the teaching by plaintiffs, Mo Hock Ke Lok Po, Dai Kung Chinese School, Chung Shan Chinese School Association, and Leong Nget Cho, of foreign languages on the ground or grounds that the pupils being taught have or have not passed any grade in the public schools or its equivalent or have or have not passed any tests in English composition or reading or are or are not of any certain age.

6. Defendants are further enjoined from interfering with the teaching by plaintiffs, Mo Hock Ke Lok Po, Dai Kung [fol. 188] Chinese School, Chung Shan Chinese School Association, and Leong Nget Cho, of foreign languages on the ground that any teacher teaching foreign languages has not been examined or certified by a Board of Examiners as to their versatility in the usage or idiom of either the English language or the foreign language or languages being taught.

7. Defendants are further enjoined from enforcing or attempting to enforce against plaintiffs, Mo Hock Ke Lok Po, Dai Kung Chinese School, Chung Shan Chinese School As-

sociation, and Leong Nget Cho, Act 104 of the Hawaiian Legislature, enacted May 1, 1943, (Chapter 31, Revised Laws of Hawaii, 1943).

8. Plaintiffs, Mo Hock Ke Lok Po, Dai Kung Chinese School, Chung Shan Chinese School Association, and Leong Nget Cho, are awarded costs in the sum of $ —.

Dated: January 24th, 1948.

(S.) William Denman, United States Circuit Judge; (S.) Paul J. McCormick, United States District Judge; (S.) Delbert E. Metzger, United States District Judge.

[fol. 189] [File endorsement omitted.]

[fol. 190] In the District Court of the United States

[Title omitted]

Amended Findings of Fact and Conclusions of Law—Filed February 11, 1948

The above entitled cause came on regularly for trial in the above entitled court on June 26, 1947, and continued thereafter on June 27, 28, 30 and July 1, 1947, before the Hon. William Denman, Circuit Judge, Hon. Paul J. McCormick, District Judge, and Hon. Delbert E. Metzger, District Judge, sitting as a three-judge court pursuant to Judicial Code, Section 266 (28 U. S. C. 380), Nicholas W. Y. Char, Esq. and A. L. Wirin, Esq., appearing as attorneys for plaintiffs, and Rhoda V. Lewis, and Thomas W. Flynn, Esq., appearing as attorneys for defendant, and oral and documentary evidence having been introduced on behalf of all parties, and the court have considered the same and heard the arguments of counsel and being fully advised, makes the following

Findings of Fact

1. The plaintiffs, Mo Hock Ke Lok Po, Dai Kung Chinese School, and Chung Shan Chinese School Association are eleemosynary corporations incorporated under the laws of [fol. 191] the Territory of Hawaii. The plaintiffs were incorporated for the sole purpose of conducting schools for

the education of children in the Chinese language and they have been conducting the same long prior to the enactment of Act 104 of the Hawaiian Legislature, enacted May 1, 1943, and they are now prepared to resume conducting said schools which were closed during the last World War.

The plaintiff, Leong Nget Cho, is a citizen of the United States and a resident of the Territory of Hawaii.

2. The defendant, Ingram M. Stainback, is the duly appointed, qualified and acting Governor of the Territory of Hawaii; the defendant, Walter D. Ackerman, Jr., is the duly appointed, qualified and acting Attorney General of the Territory of Hawaii; and the defendant, W. H. Loper, is the duly appointed, qualified and acting Superintendent of Public Instruction of the Territory of Hawaii. Each of said defendants is a resident and citizen of the Territory of Hawaii.

3. During the regular session of the Legislature of the Territory of Hawaii held in the year 1943, there was passed an act designated "Act 104" duly approved on the 1st day of May, 1943, entitled "An act regulating the teaching of languages to children." Said Act is embodied in the Revised Laws of Hawaii of 1945 as Chapter 31.

4. A controversy exists between the plaintiffs and the defendants pertaining to the constitutionality of said statute both on its face and as applied. Said defendants threaten to, and intend to, enforce said statute against the plaintiffs, unless enjoined from so doing by order of this court.

The plaintiffs herein seek judgment declaring their rights in the premises, and adjudging said Act to be unconstitu- [fol. 192] tional; and seek further an injunction against the defendants restraining the enforcement of said Act by them. The matter in controversy as to each of plaintiffs, other than Wah Chan Thom and Wilfred Chong, exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

5. No controversy amounting to Three Thousand Dollars ($3,000.00) exists as to Wah Chan Thom and Wilfred Chong and the defendants.

6. Plaintiff, Mo Hock Ke Lok Po, is an incorporated association operating the Chinese school known as Mun Lun Chinese School, which was founded in 1907. There are 36

members of said incorporated association. Said incorporated association employed 27 teachers prior to December 7, 1941. Since that date and up to April 1946, the school closed and permitted its premises to be occupied temporarily by the United States Army as offices. Prior to the closing of the school there were 1,100 pupils attending the school, of whom 160 were in the first grade and 150 were in the second grade. The said incorporated association is the owner of property worth $100,000.00.

7. The plaintiff, Chung Shan Chinese School Association, was founded in the year 1911 and was duly incorporated under the laws of the Territory of Hawaii as an eleemosynary corporation in 1920. After December 7, 1941, and up to October 1946, the school premises owned by said plaintiff were occupied by the United States Army. Prior to December 7, 1941, there were 850 students attending the school, of whom 120 were in the first grade and 120 were in the second grade. The said corporation is the owner of property worth about $85,000.00.

8. The plaintiff, Dai Kung Chinese School, operated a Chinese language school prior to December 7, 1941.

[fol. 193] 9. By virtue of the passage of Act 104 and its enforcement as threatened by the defendants, each of said plaintiff schools will be irreparably damaged in excess of $3,000.00, exclusive of interest.

10. The plaintiff, Leong Nget Cho, is a citizen of the United States and a resident of the Territory of Hawaii. He was born in the Territory of Hawaii but went to China at approximately 6 years of age, where he acquired a thorough knowledge of the Chinese language. Thereafter he returned to the Territory of Hawaii where he has been a resident ever since for approximately 30 years.

His occupation has been that of a teacher of Chinese in Chinese language schools, and for more than 20 years he has been employed by the Chung Shan Chinese School Association. He has no other occupation. He is not well versed in the usage and idiom of the English language; he does not desire to submit to an examination pertaining to the English language by the board of examiners as provided in Section 3 of Act 104.

11. The plaintiff, Leong Nget Cho, was able to secure a contract to teach Chinese at the Chinese language school

owned by the plaintiff Chung Shan Chinese School Association in 1943 at a salary of One Hundred Dollars ($100.00) per month for a period of three years. But due to the passage of Act 104 he has not been able to pursue this position nor to obtain any other work in his profession. By virtue of the enactment of Act 104 and its enforcement as threatened by defendants, he will be irreparably damaged in a sum in excess of $3,000.00, exclusive of interest and costs.

12. In the public schools of Hawaii, foreign languages are not taught to any children under the age of 15, though it [fol. 194] be the desire of the parents of such children that they learn foreign languages.

13. In the Territory of Hawaii there are some 22,357 children in the first four grades of its schools. That of this number at least 10,000 are above the average in intellectual ability referred to in the legislative finding in Act 104 of the Hawaiian Legislature of May 1, 1943. They are the brighter ones, for whom the learning of a foreign language prior to their sixth year of age or prior to their completion of the fouth year of instruction in the Hawaiian public schools will cause no detriment to them in their general education, their health, or otherwise.

14. The plaintiff schools have in the past taught children of such above the average intelligence and will teach such children hereafter. There is no pedagogical or other reason why such above the average children should be prohibited from being taught Chinese in the plaintiff schools.

From the above facts the court makes the following

Conclusions of Law:

1. It is not necessary to decide the plaintiffs' contention that the legislature of Hawaii has no power to deny to any child the right to acquire a foreign language in his infancy.

2. Act 104 of the Hawaiian Legislature, enacted May 1, 1943 (Chap. 31, Revised Laws of Hawaii, 1945), deprives the parents of such 10,000 or more above the average children of their right to have them taught a foreign language and the plaintiffs' schools and plaintiff Leong Nget Cho of their right to teach such children the Chinese language, and thereby violates the Fifth Amendment of the Constitution of the United States. Such wrongful deprivation of the

rights of such a large portion of the children and parents [fol. 195] sought to be controlled by the Act so frustrates its purposes that none of its provisions is enforcible.

3. The plaintiff schools and Leong Nget Cho are entitled to a permanent injunction against the defendants prohibiting the enforcement of Act 104 of the Hawaiian Legislature enacted May 1, 1943.

4. The complaint must be dismissed as to plaintiffs Wah Chan Thom and Wilfred Chong for lack of jurisdiction in this court.

5. The clerk of the court is ordered to enter a decree in accordance with these Findings of Fact and Conclusions of Law.

(S.) William Denman, United States Circuit Judge; (S.) Paul J. McCormick, United States District Judge; (S.) Delbert M. Metzger, United States District Judge.

[fol. 196] [File endorsement omitted.]

[fol. 197] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII, CIVIL ACTION

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, Chung Shan Chinese School Association, an Eleemosynary Corporation, Wah Chan Thom, Wilfred Chong, and Leong Nget Cho, Plaintiffs,

vs.

INGRAM M. STAINBACK, WALTER D. ACKERMAN, JR. and W. H. LOPER, Defendants

AMENDED JUDGMENT—Filed February 11, 1948

The above entitled cause came on regularly for trial in the above entitled court on June 26, 1947 and continued thereafter on June 27, 28, 30 and July 1, 1947, before the Hon. William Denman, Circuit Judge, Hon. Paul J. McCormick, District Judge, and Hon. Delbert E. Metzger, District Judge, sitting as a three-judge court pursuant to Judicial Code, Section 266 (28 USC 380), Nicholas W. Y. Char, Esq.,

and A. L. Wirin, Esq., appearing as attorneys for plaintiffs, and Rhoda V. Lewis, Esq., and Thomas W. Flynn, Esq., appearing as attorneys for defendants, and oral and documentary evidence having been introduced on behalf of all parties, and the court having considered the same and heard the arguments of counsel and cause having been submitted for decision, and the court having heretofore made and caused to be filed its Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged, and Decreed that:

1. The complaints of Wah Chan Thom and Wilfred Chong are dismissed.

[fol. 198] 2. Plaintiffs, Mo Hock Ke Lok Po, Dai Kung Chinese School, and Chung Shan Chinese School Association, are entitled to teach foreign languages in their schools to students, regardless of whether said students have or have not passed any grade in the public schools or its equivalent, and regardless of whether said students have or have not passed any tests in English composition or reading, and regardless of the age of said students.

3. Plaintiffs, Mo Hock Ke Lok Po, Dai Kung Chinese School, and Chung Shan Chinese School Association, are entitled to hire as teachers to teach their students, regardless of age, foreign languages without said teachers having been examined or certified by a Board of Examiners as to their versatility in the usage or idiom of either the English language or the foreign language or languages taught by said teachers.

4. Plaintiff, Leong Nget Cho, is entitled to follow his profession as a teacher of foreign languages and to teach children, regardless of their age, without having been examined or certified by a Board of Examiners as to his versatility in the usage or idiom of either the English language or the foreign language or languages he teaches.

5. Defendants are enjoined from interfering with the teaching by plaintiffs, Mo Hock Ke Lok Po, Dai Kung Chinese School, Chung Shan Chinese School Association, and Leong Nget Cho, of foreign languages on the ground or grounds that the pupils being taught have or have not passed any grade in the public schools or its equivalent or have or have not passed any tests in English composition or reading or are or are not of any certain age.

6. Defendants are further enjoined from interfering with the teaching by plaintiffs, Mo Hock Ke Lok Po, Dai Kung [fol. 199] Chinese School, Chung Shan Chinese School Association and Leong Nget Cho, of foreign languages on the ground that any teacher teaching foreign languages has not been examined or certified by a Board of Examiners as to their versatility in the usage or idiom of either the English language or the foreign language or languages being taught.

7. Defendants are further enjoined from enforcing or attempting to enforce against plaintiffs, Mo Hock Ke Lok Po, Dai Kung Chinese School, Chung Shan Chinese School Association, and Leong Nget Cho, Act 104 of the Hawaiian Legislature, enacted May 1, 1943, (Chapter 31, Revised Laws of Hawaii, 1945).

8. Plaintiffs, Mo Hock Ke Lok Po, Dai Kung Chinese School, Chung Shan Chinese School Association, and Leong Nget Cho, are awarded costs in the sum of $159.51.

Dated: February 4, 1948.

(S.) William Denman, United States Circuit Judge. (S.) Paul J. McCormick, United States District Judge. (S.) Delbert E. Metzger, United States District Judge.

[fol. 200] IN UNITED STATES DISTRICT COURT

MINUTE ENTRIES OF PROCEEDINGS AND TRIAL—January 28, 1947

On this day came Mr. W. Y. Char, counsel for the plaintiffs herein, and also came Miss Rhoda Lewis and Mr. Thomas W. Flynn, Deputy Attorneys General, Territory of Hawaii, counsel for the defendants herein. This case was called for formal decision on motion for allowance of preliminary injunction and hearing on application to disqualify the presiding judge.

Order Denying Preliminary Injunction, Findings of Fact and Conclusions of Law, was signed by the Court and ordered to be placed on file.

Exceptions to said order were noted and allowed by the Court.

The Court then found that the application to disqualify himself as presiding to be defective, however, upon the

Court's own motion, the trial of this case was ordered transferred to the Honorable D. E. Metzger.

[fol. 201] February 26, 1947.

On this day came Mr. W. Y. Char, counsel for the plaintiffs herein, and also came Mr. Thomas Flynn, Deputy Attorney General of the Territory of Hawaii, counsel for the respondents herein. This case was called for further hearing on motion to dismiss and jurisdiction, and on motion to strike plaintiff's supplemental pleading.

Following argument by Mr. Flynn, motion to strike plaintiff's supplemental pleading was denied by the Court. Exceptions were allowed the respondent.

Mr. Kong Chin Young, Principal, Chung Shan School, was called and sworn and testified on behalf of the plaintiffs.

It was stipulated by respective counsel as to the testimony of the principals of Dai Koong School and Mun Lun School if they were called as witnesses in this case.

Mr. Wah Chan Thom, Manager, Nu Enamel Company, was called and sworn and testified on behalf of the plaintiffs.

Mr. Lum Young Kan, retired merchant and president of Chung Shan School, was called and sworn and testified on behalf of the plaintiffs.

Thereafter, the Court found that it had jurisdiction as to the controversial amount involved, and the motion to dismiss was denied by the Court. Exceptions were allowed the respondents.

Following argument by respective counsel on the matter of equitable relief sought in a court of the Territory of Hawaii or of the United States, the Court ordered that this case be continued to February 28, 1947 at 9 a. m. for ruling.

[fol. 202] February 28, 1947.

On this day came Mr. W. Y. Char, counsel for the plaintiffs herein, and also came Mr. Thomas Flynn, Deputy Attorney General of the Territory of Hawaii, counsel for the respondents herein. This case was called for ruling on the matter of equitable relief.

Motion to dismiss was renewed by Mr. Flynn and overruled by the Court. Exceptions were allowed the respondents.

Upon request of Mr. Char, plaintiff's motion to strike was allowed to be withdrawn by the Court.

The Court ordered memoranda submitted on the matter of a permanent injunction by March 7, 1947, and continued this case to March 7, 1947 at 9 a. m. for setting.

[fol. 203] March 7, 1947.

On this day came Mr. W. Y. Char, counsel for the plaintiffs herein, and also came Mr. Thomas Flynn, Deputy Attorney General of the Territory of Hawaii, counsel for the respondents herein. This case was called for hearing on the matter of a court of three judges and for setting.

Following a discussion on the matter of a court of three judges, the Court ordered that this case be further continued to March 14, 1947 at 9 a. m.

[fol. 204] March 14, 1947.

On this day came Mr. W. Y. Char, counsel for the plaintiffs herein, and also came Mr. Thomas Flynn, Deputy Attorney General of the Territory of Hawaii, counsel for the respondents herein. This case was called for further hearing on the matter of a court of three judges.

Following a further discussion on the matter of a court of three judges, the Court ordered that this case be further continued to March 21, 1947.

[fol. 205] June 20, 1947.

On this day came Mr. W. Y. Char and Mr. A. L. Wirin, counsel for the plaintiffs herein, and also came Mr. Thomas W. Flynn, Deputy Attorney General of the Territory of Hawaii, counsel for the defendants herein, and Mr. J. Russell Cades and Mr. Edward Z. Buck, representing the Bar Association of Hawaii, as amicus curiae. This case was called for hearing on the matter of jurisdiction.

Judge Denman requested respective counsel to express their views on the question of jurisdiction of this Court sitting as a three judge court in conducting the hearing of this case.

Following argument by Mr. Flynn, Mr. Cades, and Mr. Wirin, the Court ordered that this case be continued to Monday, June 23, 1947 at 9 a. m.

[fol. 206] June 23, 1947.

On this day came Mr. W. Y. Char and Mr. A. L. Wirin, counsel for the plaintiffs herein, and also came Mr. Thomas

W. Flynn, Deputy Attorney General of the Territory of Hawaii, counsel for the defendants herein, and Mr. J. Russel Cades and Mr. Edward Z. Buck, representing the Bar Association of Hawaii, as amicus curiae. This case was called for decision on the question of jurisdiction of this court sitting as a three judge court in conducting the hearing of this case.

Judge Denman, speaking for the Court, announced that the three judge court shall assume jurisdiction in this case.

The Court then ordered that this case be continued to Thursday, June 26, 1947 at 9 a. m. for trial.

[fol. 207] June 26, 1947.

On this day came Mr. W. Y. Char and Mr. A. L. Wirin, counsel for the plaintiffs herein, and also came Mr. Thomas W. Flynn, Deputy Attorney General of the Territory of Hawaii, counsel for the defendants herein. This case was called for trial.

Request was made by Mr. Wirin to be allowed to file an amended complaint and to add additional plaintiffs.

Said request was granted by the Court with the understanding that the defendants be allowed the denial of certain allegations to the amended complaint as contained in the answer to the original complaint.

Opening statement was made by Mr. Wirin.

Opening statement was made by Mr. Flynn.

Typewritten list showing number of Chinese students attending public schools at the end of December 1945 and June 1946 was admitted in evidence as Plaintiffs' Exhibit "A," marked and ordered filed.

Upon motion of Mr. Wirin, Paragraph 12 of the amended complaint was stricken.

Mr. Wah Chan Thom, manager, Nu Enamel Company, was called and sworn and testified on behalf of the plaintiffs.

Mr. Wilfred C. Chong was called and sworn and testified on behalf of the plaintiffs.

Mr. Leong Ngut Cho, Chinese School teacher, was called and sworn and testified on behalf of the plaintiffs.

Mr. Pung Chong Lee, grocer, was called and sworn and testified on behalf of the plaintiffs.

[fol. 208] Mr. John E. Reinecke, teacher, was called and sworn and testified on behalf of the plaintiffs.

At 3:45 p. m., the Court ordered that this case be continued to June 27, 1947 at 9 a. m. for further trial.

[fol. 209] June 27, 1947.

On this day came Mr. W. Y. Char and Mr. A. L. Wirin, counsel for the plaintiffs herein, and also came Mr. Thomas W. Flynn, Deputy Attorney General of the Territory of Hawaii, counsel for the defendants herein. This case was called for further trial.

Mr. John E. Reinecke resumed the witness stand on cross-examination.

At 9:40 a. m., the plaintiffs rested their case.

At 10:00 a. m., Mr. W. Harold Loper, Superintendent, Department of Public Instruction, was called and sworn and testified on behalf of the defendants.

Mr. F. Deal Crooker, Principal, Punahou Elementary School, was called and sworn and testified on behalf of the defendants.

Typewritten list showing number of children attending public and private schools was admitted in evidence as Plaintiffs' Exhibit "B," marked and ordered filed.

Mr. Bruce White, Assistant Professor and Dean, Teachers College, University of Hawaii, was called and sworn and testified on behalf of the defendants.

At 3:43 p. m., the Court ordered that this case be continued to June 28, 1947 at 9 a. m. for further trial.

[fol. 210] June 28, 1947.

On this day came Mr. W. Y. Char and Mr. A. L. Wirin, counsel for the plaintiffs herein, and also came Mr. Thomas W. Flynn, Deputy Attorney General of the Territory of Hawaii, counsel for the defendants herein. This case was called for further trial.

Mr. Richard D. Meyer, Assistant Superintendent, Department of Public Instruction, was called and sworn and testified on behalf of the defendants.

Mr. Oren E. Long, Secretary of the Territory of Hawaii and Acting Governor of Hawaii, was called and sworn and testified on behalf of the defendants.

House Resolution 3034, Hearing on Statehood for Hawaii, was marked for identification as Plaintiffs' No. 1.

Senate Concurrent Resolution 18, Hearing on Statehood for Hawaii, was marked for identification as Plaintiffs' No. 2.

Mr. Fred Frizelle, Inspector, Department of Public Instruction, was called and sworn and testified on behalf of the defendants.

At 11:30 a. m. the Court ordered that this case be continued to June 30, 1947 at 9 a. m.

June 30, 1947.

[fol. 211] On this day came Mr. W. Y. Char and Mr. A. L. Wirin, counsel for the plaintiffs herein, and also came Mr. Thomas W. Flynn, Deputy Attorney General of the Territory of Hawaii, counsel for the defendants herein. This case was called for further trial.

Mr. Emanuel Kwon, Principal, was called and sworn and testified on behalf of the defendants.

Dr. J. Robert Jacobson, Clinical Director, Territorial Hospital, was called and sworn and testified on behalf of the defendants.

Mrs. Sarah Lee Yang, Supervisor, 4th, 5th, and 6th grades, Teachers College, University of Hawaii, was called and sworn and testified on behalf of the defendants.

Miss Helen Gay Pratt, Director, Child Study, Department of Public Instruction, was called and sworn and testified on behalf of the defendants.

Mr. Orrin W. Robinson, Deputy Superintendent, Department of Public Instruction, was called and sworn and testified on behalf of the defendants.

It was stipulated by respective counsel as to the testimony of William Wong if he were called and sworn to testify herein.

Community Survey of Education in Hawaii was admitted in evidence as Defendants' Exhibit No. 1, marked and ordered filed.

Photostat copy of the Percival M. Symonds Report was admitted in evidence as Plaintiffs' Exhibit "C," marked and ordered filed.

Copy of House Report Commission on Education, 1923 Session, was admitted in evidence as Plaintiffs' Exhibit "D," marked and ordered filed.

[fol. 212] House Resolution Hearing Statehood for Hawaii 236 was marked for identification as Plaintiffs' No. 3.

Dr. Madorah Elizabeth Smith, retired teacher, University of Hawaii, was called and sworn and testified on behalf of the defendants.

Copy of Letter, Attorney General of the Territory of Hawaii to W. H. Loper, dated December 19, 1946, was admitted in evidence as Defendants' Exhibit No. 2, marked and ordered filed.

Copy of Department of Public Instruction statistical data as of June 14, 1946, Chinese pupils by grades, etc., was admitted in evidence as Defendants' Exhibit No. 3, marked and ordered filed.

Report to the Governor on bills passed by the Legislature on House Bill No. 395, dated May 13, 1947, was admitted in evidence as Defendants' Exhibit No. 4, marked and ordered filed.

At 3:24 p.m., the defendants rested their case.

It was stipulated by respective counsel as to the closing of the schools, enrollment, and school curriculum.

At 3:45 p.m., Mr. John Reinecke was recalled to the witness stand by the plaintiffs on rebuttal.

At 4:26 p.m., the Court ordered that this case be continued to July 1, 1947 at 9 a.m. for further trial.

[fol. 213] July 1, 1947. On this day came Mr. W. Y. Char and Mr. A. L. Wirin, counsel for the plaintiffs herein, and also came Mr. Thomas W. Flynn and Miss Rhoda V. Lewis, Deputy Attorneys General of the Territory of Hawaii, counsel for the defendants herein. This case was called for further trial.

It was stipulated by respective counsel as to the number of language schools.

At 9:15 a.m., argument was had by Mr. Char.

At 9:36 a.m., argument was had by Mr. Flynn and at 10:31 a.m., argument was continued by Miss Lewis.

At 11:22 a.m., argument was had by Mr. Wirin.

Hearing Statehood for Hawaii marked for identification as Plaintiffs' No. 3, was admitted in evidence as Plaintiffs' Exhibit "E," marked and ordered filed.

Hearing Statehood for Hawaii marked for identification as Plaintiffs' No. 2, was admitted in evidence as Plaintiffs' Exhibit "F," marked and ordered filed.

Excerpts from Hearing on Statehood for Hawaii "Friend or Foe?" was admitted in evidence as Plaintiffs' Exhibit "G," marked and ordered filed.

Hearing on Statehood for Hawaii marked for identification as Plaintiffs' No. 1, was admitted in evidence as Plaintiffs' Exhibit "H," marked and ordered filed.

At 2:15 p.m., closing argument was continued by Mr. Wirin.

At 3:10 p.m., this case was taken under advisement.

[fol. 214] [File endorsement omitted.]

[fol. 215] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed March 31, 1948

To the: District Court of the United States in and for the District and Territory of Hawaii.

Your petitioners, Ingram M. Stainback, Walter D. Ackerman, Jr., and W. H. Loper, each individually and respectively as Governor of the Territory of Hawaii, Attorney General of the Territory of Hawaii, and Superintendent of Public Instruction of the Territory of Hawaii, who are the defendants in the above entitled cause, pray that they may be permitted to take an appeal from the final Amended Judgment, entered in the above entitled cause on the 11th day of February 1948, to the Supreme Court of the United States for the reasons specified in the Assignment of Errors filed by said petitioners.

[fol. 216] Your petitioners further pray that said appeal be allowed to the Supreme Court of the United States for the correction of the errors so complained of in said Assignment of Errors, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated at Honolulu, T. H., this 31st day of March 1948.

Ingram M. Stainback, Walter D. Ackerman, Jr., and W. H. Loper, By Rhoda V. Lewis, Assistant Attorney General, Territory of Hawaii. By Thomas W. Flynn, Deputy Attorney General, Territory of Hawaii, Attorneys for Defendants.

[fol. 217] [File endorsement omitted.]

[fol. 218] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 16, 1948

To the: District Court of the United States in and for the District and Territory of Hawaii.

Come now Ingram M. Stainback, Walter D. Ackerman, Jr. and W. H. Loper, each individually and respectively as Governor of the Territory of Hawaii, Attorney General of the Territory of Hawaii and Superintendent of Public Instruction of the Territory of Hawaii, who are the defendants in the above entitled cause, and in connection with their appeal to the Supreme Court of the United States from the final amended judgment of the District Court of the United States in and for the District and Territory of Hawaii, entered the 13th day of February 1948, jointly and severally make and file the following assignment of errors upon which they will rely in their prosecution of the said appeal from the said judgment, and say that in the record, proceedings, [fol. 219] and judgment therein, manifest error has interfered, to the prejudice of said defendants as follows, to-wit:

1. The court erred in denying defendants' motion to dismiss.

2. The court erred in overruling defendants' "Defenses in Law".

3. The court erred in denying defendants' motion to strike plaintiffs' supplemental pleading.

4. The court erred in holding that the complaint sufficiently alleged that as to each of the plaintiffs Mo Hock Ke Lok Po, Doi Kung Chinese School, and Chung Shan Chinese School Association (hereinafter called the plaintiff school corporations), the matter in controversy exclusive of interest and costs exceeded $3,000.

5. The court erred in holding that the plaintiff school corporations, or any of them, had made sufficient showing that the matter in controversy exclusive of interest and costs exceeded $3,000.

6. The court erred in finding and deciding that by virtue of the passage of Act 104 of the Session Laws of Hawaii

1943, Chapter 31 of the Revised Laws of Hawaii 1945 (hereinafter called the statute), and its enforcement as threatened by defendants, each of the plaintiff school corporations will be irreparably damaged in an amount in excess of $3,000 or any other amount.

7. The court erred in holding that the complaint stated a claim for injunctive relief against the enforcement of the statute.

[fol. 220] 8. The court erred in permanently enjoining said defendants from enforcing or attempting to enforce the statute against the plaintiff school corporations and Leong Nget Cho, or any of them.

9. The court erred in adjudicating and declaring the rights of the plaintiffs, there being no right to declaratory relief when the case was not a proper one for equitable relief.

10. The court erred in placing its own construction on the statute when the courts of the Territory of Hawaii had not construed the statute nor had an opportunity to do so, and there were easy and ample means for determining the issues of territorial law in the courts of the Territory of Hawaii.

11. The court erred in failing to confine its consideration to the case or controversy presented by the intended application of the statute by the defendants under their interpretation thereof.

12. The court erred in failing to confine its consideration to the case or controversy presented by the pleadings, and in considering hypothetical cases.

13. The court erred in holding that the hypothetical case of the tutoring of two or more children in the home in the doctrines of Confucius was to be considered, and that the supposed case of such tutoring was not divisible from the case presented by the plaintiff school corporations.

14. The court erred in failing to presume the statute constitutional.

[fol. 221] 15. The court erred in failing to so construe the statute as to sustain its constitutionality.

16. The court erred in failing to give due weight to the findings made by the legislature in the statute.

17. The court erred in failing to give due weight to the legislature's prerogative of resolving a conflict of opinion as to the harmful effects of bilingual instruction of very young children (children who have not yet passed the fourth grade or its equivalent) in English and Oriental languages.

18. The court erred in failing to give due weight to the existence of peculiar language problems in the Territory of Hawaii which are detrimental to the accomplishment by the Territory of its objective of universal education in the basic school studies.

19. The court erred in failing to give due weight to the relation of the Territory of Hawaii to the children of said Territory, as parens patriae.

20. The court erred in failing to give due consideration to the powers of the Territory of Hawaii to protect the health and welfare of the children in said Territory.

21. The court erred in holding the statute unconstitutional, and at the same time holding it to be unnecessary to decide or pass upon plaintiffs' contention that the legislature of Hawaii has no power to deny to any child the right to acquire a foreign language in his infancy.

22. The Court erred in failing to give due weight to the reasonableness of the statutory requirements in the light [fol. 222] of the facts.

23. The court erred in failing to give due weight to the evidence of prevailing educational practices in the Territory of Hawaii and throughout the world.

24. The court erred in interpreting the legislative findings contained in the statute as findings relating to the mean average of children, to-wit, half the children of the Territory of Hawaii in the first four grades of school.

25. The court erred in failing to give due weight to the findings of the legislature, contained in the statute, as constituting findings relating to all children in the Territory of Hawaii in their early and formative years, except those of unusual intelligence who even before passing the fourth grade are so clearly proficient in the English language as to attain a test score of at least 5.6 on standard tests in composition and in reading.

26. The court erred in failing to find that in the Territory of Hawaii, save in exceptional cases, bilingual instruction of very young children (children who have not yet passed the fourth grade or its equivalent), in English and Oriental languages, materially interferes with the accomplishment of their education in the basic school studies, and with their health and welfare.

[fol. 223] 27. In the face of conflicting evidence as to the interference of bilingual instruction of very young children (children who have not yet passed the fourth grade or its equivalent), in English and Oriental languages, with the accomplishment of their education in the basic school studies, and with their health and welfare, plaintiffs having produced evidence in an endeavor to show that there is no such interference save in exceptional cases, and defendants having produced evidence in an endeavor to show that there is such interference save in exceptional cases, the court erred in finding such interference in one half of the cases, this being a finding unsupported by the plaintiffs' evidence or the defendants' evidence.

And such error amounted to a failure to resolve the conflict in the evidence.

28. The court erred in finding and deciding that of 22,357 children in the first four grades, at least 10,000 are of such intelligence that the learning of a foreign language prior to passing of the fourth grade will cause no detriment to them in their general education, their health, or otherwise.

29. The court erred in finding and deciding that of 22,357 children in the first four grades, at least 10,000 are of such intelligence that there is no pedagogical or other reason why they should be prohibited from being taught Chinese in the plaintiffs' schools.

30. The court having erroneously found and decided that approximately 10,000 out of 22,357 children in the first four grades are of such intelligence that the learning of a foreign language prior to passing of the fourth grade will [fol. 224] cause no detriment to them, further erred:

In failing to consider and give due weight to the fact that plaintiff school corporations offer no instruction in the basic school studies and hence the supposed group of 10,000 children could not secure a complete education by attendance at their schools.

In assuming without evidence thereof that this supposed group of 10,000 children could be instructed in the basic school studies, in the public schools and in private schools offering such basic school studies, without detrimental interference arising from the necessity of also instructing in the basic school studies the remaining 12,357 children who, even under the court's erroneous finding, are handicapped by bilingual instruction in the first four grades.

In finding and deciding that the parents of the supposed group of 10,000 children of superior intelligence were deprived by the statute of their right to have them taught a foreign language, it being erroneous to assume that their supposedly superior intelligence would not equally ameliorate the supposed burden of the statutory requirements.

31. The court erred in holding that the statute deprives the parents of more than 10,000 children of their right to have them taught a foreign language, the reasonable regulations of the statute not constituting a deprivation of such right, assuming without conceding that the rights of parents were entitled to be considered.

32. The court erred in passing upon the constitutionality of the statute in the light of the rights of parents, when it had held that presence of the jurisdictional amount in controversy was necessary to consideration of such rights.

[fol. 225] 33. It was error for the court to make any finding concerning, or to consider, the alleged rights of parents who were not parties to the cause, or the alleged rights of the plaintiff parents Wah Chan Thom and Wilfred Cheng, who were dismissed from the action.

34. The court erred in adjudging the statute unconstitutional as to the plaintiff school corporations without considering the extent of actual interference in the conduct of schools by said corporations which enforcement of the statute would cause.

35. The court erred in making findings and conclusions as to the rights of children, there being no children before the court as parties to the cause.

36. The court erred in holding the statute wholly unconstitutional.

37. The court erred in failing to separately pass upon the reasonableness of the following statutory requirements, and in failing to consider each as divisible from the others:

(a) The requirement that a teacher of a foreign language to a child under the age of fifteen shall demonstrate that he is reasonably well versed in the usage and idiom of such foreign language.

(b) The requirement that a teacher of a foreign language to a child under the age of fifteen shall demonstrate that he is reasonably well versed in the usage and idiom of the English language.

(c) The requirement that a student under the age of fifteen, in order to undertake the study of a foreign language, shall have passed the fourth grade in public [fol. 226] school or an equivalent course of study.

(d) The requirement that students under the age of fifteen who have not yet passed the eighth grade and who are studying or about to undertake the study of a foreign language, may be required to demonstrate, by a standard test as defined in the statute, that they have such proficiency in English as must be attained by other students in the same grade in order to pass in English studies.

And the court erred in failing to uphold as constitutional each and every of the foregoing statutory requirements.

38. The court erred in permanently enjoining defendants from interfering with the teaching by the plaintiff school corporations and Leong Nget Cho, or any of them, of foreign languages on the ground or grounds:

That the pupils being taught have or have not passed any grade in the public schools or its equivalent;

That the pupils being taught have or have not passed any tests in English composition or reading;

That the pupils being taught are or are not of certain age.

And as to each of the said matters it constituted error for the court to so enjoin the defendants.

39. The court erred in permanently enjoining defendants from interfering with the teaching by plaintiff school cor-

porations and Leong Nget Cho, or any of them, of foreign languages on the ground that any teacher teaching foreign languages has not been examined or certified by a Board of Examiners.

[fol. 227] 40. The court erred in holding that the plaintiff school corporations are entitled to teach foreign languages in their schools to students:

Regardless of whether said students have or have not passed any grade in the public schools or its equivalent.

Regardless of whether said students have or have not passed any tests in English composition or reading.

Regardless of the age of said students.

And as to each of the said matters it constituted error for the court to so hold.

41. The court erred in holding that the plaintiff school corporations are entitled to hire to teach foreign languages to their students, regardless of age, teachers who have not been examined or certified by a Board of Examiners:

As to their versatility in the usage or idiom of the English language.

As to their versatility in the usage or idiom of the foreign language to be taught.

And as to each of said matters it constituted error for the court to so hold.

42. The court erred in holding that the plaintiff Leong Nget Cho, is entitled to follow his profession as a teacher of foreign languages and teach children regardless of their age without having been examined or certified by a Board of Examiners:

As to his versatility in the usage of idiom of the English language.

[fol. 228] As to his versatility in the usage or idiom of the foreign language to be taught.

And as to each of the said matters it constituted error for the court to so hold.

43. The court erred in finding and deciding that the plaintiff Leong Nget Cho was able to secure a contract to teach

Chinese at the Chinese language school owned by the plaintiff Chung Shan Chinese School Association in 1943, there being no evidence thereof.

Wherefore, the said defendants pray that the said judgment and decree of the District Court be reversed with directions to dismiss the amended complaint filed in this cause.

Dated at Honolulu, Territory of Hawaii, this 16th day of April, 1948.

Respectfully submitted, Ingram M. Stainback, Governor of Hawaii, By Walter D. Ackerman, Jr., Attorney General of Hawaii; Rhoda V. Lewis, Assistant Attorney General of Hawaii; and Thomas W. Flynn, Deputy Attorney General of Hawaii, By Walter D. Ackerman, Jr., Attorneys for Defendants.

[fols. 229-232] Bond on appeal for $500.00 approved and filed April 16, 1948, omitted in printing.

[fol. 233] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed April 16, 1948

Upon hearing and consideration of the petition of Ingram M. Stainback, Governor of the Territory of Hawaii, Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii, and W. H. Loper, Superintendent of Public Instruction of the Territory of Hawaii, defendants in the above entitled cause, for appeal from the final judgment entered herein on the 13th day of February 1948, said petition being for appeal to the Supreme Court of the United States from said final judgment rendered in this cause by a specially constituted three-judge court, permanently enjoining said defendants from enforcing against said plaintiffs, Act 104 of the Session Laws of Hawaii 1943, being also Chapter 31 of the Revised Laws of Hawaii 1945, it is hereby ordered that said petition be granted and the appeal is allowed.

[fol. 234] The said defendants having tendered a bond in the sum of $500.00, conditioned according to law, which bond is a sufficient bond, conditioned to pay costs of this appeal, said bond is hereby approved.

It is further ordered, adjudged and decreed that the appeal hereby allowed is returnable within forty (40) days from the date hereof.

Dated at Honolulu, T. H., this 16th day of April 1948.

(S.) Delbert E. Metzger, District Judge of the District Court of the United States in and for the District and Territory of Hawaii.

[fols. 235-241] Citation in usual form showing service on W. Y. Char, et al., filed April 16, 1948, omitted in printing.

[fol. 242] [File endorsement omitted]

[fol. 243] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR RECORD ON APPEAL—Filed April 16, 1948

To the Clerk of the District Court of the United States in and for the District and Territory of Hawaii:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to appeal allowed in the above entitled cause and to include in such transcript the following papers and exhibits:

1. Bill of Complaint.
2. Summons issued thereon.
3. Return of service of summons.
4. Stipulation and Order extending time to answer.
5. Motion for Allowance of Preliminary Injunction, Affidavit and Notice of Motion.
6. Answer and Exhibits A and B.
7. Defendants' Objections to Allowance of Preliminary Injunction and Affidavits.

[fol. 244] 8. Order Denying Preliminary Injunction.

9. Minute entires of clerk of court dated January 28, 1947.

10. Motion to Set for Hearing the "Defenses in Law" of Defendants and Order Setting Date of Hearing.

11. Motion to Dismiss and Notice of Motion.

12. Plaintiffs' Supplemental Pleading.

13. Motion to Strike Plaintiffs' Supplemental Pleading.

14. Minute entries of clerk of court of February 26, 1947.

15. Minute entries of clerk of court of February 28, 1947.

16. Minute entries of clerk of court of March 7, 1947.

17. Minute entries of clerk of court of March 14, 1947.

18. Minute entries of clerk of court of March 17, 1947.

19. Minute entires of clerk of court of May 27, 1947.

20. Minute entires of clerk of court of June 20, 1947.

21. Minute entries of clerk of court of June 23, 1947.

22. Amended Complaint.

23. Minute entries of clerk of court of June 26, 1947.

24. Answer to Amended Complaints and Exhibits A and B.

25. Stipulation filed August 16, 1947.

26. Opinion of the Court.

27. Opinion of the Court re Applicability of Section 266 of the Judicial Code.

28. Dissenting Opinion of Denman, Circuit Judge, re Applicability of Section 266 of the Judicial Code.

29. Stipulation of facts filed December 4, 1947.

[fol. 245] 30. Amendment to Amended Complaint.

31. Stipulation and Order filed January 19, 1948.

32. Findings of Fact and Conclusions of Law.

33. Judgment.

34. Amended Findings of Fact and Conclusions of Law.

35. Amended Judgment.

36. Petition for Appeal.

37. Assignment of Errors.

38. Bond on Appeal.

39. Order Allowing Appeal.

40. Citation.

41. Acknowledgment of service of Citation.

42. Appellants' Statement as to Jurisdiction, with Appendices.
43. Appellees' Statement as to Jurisdiction.
44. This Praecipe.
45. Acknowledgment of Service of Praecipe.

Dated at Honolulu, T. H., this 16th day of April 1948.

Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii; Rhoda V. Lewis, Assistant Attorney General of the Territory of Hawaii, and Thomas W. Flynn, Deputy Attorney General of the Territory of Hawaii, by Thomas W. Flynn, Attorneys for Defendants.

[fol. 246]. [File endorsement omitted]

[fol. 247] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PLAINTIFFS' AND APPELLEES' DESIGNATION OF ADDITIONAL PORTIONS OF RECORD—Filed April 20, 1948

The plaintiffs and appellants hereby designate the following additional portions of the record, to be incorporated in the Record on Appeal to the United States Supreme Court and to be printed pursuant to Rule 10, United States Supreme Court:

(1) Plaintiffs' Exhibit A—List showing Chinese students attending a private school.
(2) Plaintiffs' Exhibit B—List showing number of students attending public and private schools.
(3) Plaintiffs' Exhibit C—Symonds Report.
(4) Plaintiffs' Exhibit D—Report—House Committee on Education, Territorial Legislature, 1923 Session.
(5) Plaintiffs' Exhibit E—Photostat Excerpts—Statehood for Hawaii, H. R. 236.
(6) Plaintiffs' Exhibit F—Photostat Excerpts—Statehood for Hawaii, S. Con. Res. 18.
(7) Plaintiffs' Exhibit G—Photostat—Heading "Friend or Foe."
[fol. 248] (8) Plaintiff's Exhibit H—Photostat—Excerpts Statehood for Hawaii, H. R. 3034.

Photostats above described need not be duplicated; but may be printed in the printed record.

Dated: Honolulu, T. H., April 2, 1948.

A. L. Wirin and W. Y. Char, by (S.) A. L. Wirin, Attorneys for Plaintiffs.

[fols. 249-249a] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 249b] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION FOR ENLARGEMENT OF TRANSCRIPT OF RECORD—Filed June 14, 1948

It Is Hereby Stipulated and Agreed by and between appellants and appellees herein, by their respective attorneys, that the transcript of record heretofore filed herein in the above entitled cause, may and shall be enlarged to include the following:

1. Reporter's transcript of proceedings commencing on June 26, 1947.

2. Reporter's transcript of proceedings held on February 26, 1947.

3. Appellants' (defendants') Exhibit 1, "Community Survey of Education in Hawaii".

[fol. 249c] 4. Notice of appeal (to the United States Circuit Court of Appeals for the Ninth Circuit).

5. Stipulation filed April 16, 1948.

6. Order filed April 16, 1948.

7. Bond on appeal (to the United States Circuit Court of Appeals for the Ninth Circuit).

8. Designation of record on appeal (to the United States Circuit Court of Appeals for the Ninth Circuit).

9. Stipulation for enlargement of time for filing of record on appeal (to the United States Circuit Court of Appeals for the Ninth Circuit).

10. Order enlarging time for filing of transcript of record on appeal (to the United States Circuit Court of Appeals for the Ninth Circuit).

11. This praecipe for additional portions of record on appeal.

It Is Further Stipulated and Agreed by and between the said appellants and appellees that the foregoing papers are important for a proper understanding of the questions raised in this court.

Dated at Honolulu, T. H., this 10 day of June 1948.

Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii; Rhoda V. Lewis, Assistant Attorney General, and Thomas W. Flynn, Deputy Attorney General, Attorneys for Appellants, by Walter D. Ackerson, Jr., W. Y. Char & A. E. Wirtz Attorneys for Appellees, by W. Y. Char.

[fol. 250] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Civil No. 765

MO HOCK KE LOK PO, an Eleemosynary Corporation; DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, and Ching Shan Chinese School Association, an Eleemosynary Corporation, Plaintiffs,

vs.

INGRAM M. STAINBACK, C. NILS TAVARES, and W. H. LOFER, Defendants

Transcript of Proceedings Filed May 14, 1948

In the above-entitled matter, held in the United States District Court, Honolulu, T. H., on Thursday, June 26, 1947,

Before Hon. William Denman, Judge, Ninth Circuit Court of Appeals, San Francisco, California; Hon. Paul J. McCormick, Judge, United States District Court, Los Angeles, California; Hon. Delbert E. Metzger, Judge, United States District Court, Honolulu, T. H.

[fol. 251] APPEARANCES:

Nicholas W. Y. Char, Esq., appearing for the Plaintiffs.

A. L. Wirin, Esq., American Civil Liberties Union, appearing for the Plaintiffs.

James Morita, Esq., appearing for the Plaintiffs.

Thomas W. Flynn, Esq., Assistant Attorney General, appearing for the Defendants.

Rhoda V. Lewis, Assistant Attorney General, appearing for the Defendants.

[fols. 252-254] Transcript

Honolulu, T. H.,
June 26, 1947,
9:00 o'clock, a. m.

The Clerk: Civil No. 765, Mo Hock Ke Lok Po, an eleemosynary corporation, Dai Kung Chinese School, an eleemosynary corporation, and Ching Shan Chinese School Association, an eleemosynary corporation, Plaintiffs, versus Ingram M. Stainback, C. Nils Tavares, and W. H. Loper, Defendants; case called for hearing.

COLLOQUY

Mr. Wirin: May it please the Court, we have filed, or sought to file, an amended complaint. It has been handed to the Clerk. The Plaintiffs, through their counsel, have been in conference with the Attorney General's Office, and I understand that there will be no objection to the filing of the amended complaint. The Defendants are ready to proceed with the trial, as are the Plaintiffs, and an answer, a formal answer, will be filed either by tomorrow or at the latest the day after.

Judge Denman: What issues are joined? For instance, there is a statement in your complaint that there are no schools other than Chinese or Japanese falling within the range of the Act. Now, here is a community seeking statehood. Can it be that no tutor teaches two children any language but Japanese or Chinese in the Islands? Have you [fol. 255] no kindergartens with children under the age of six where other languages are taught? I mean to say that it seems to me that the issue that is going to be raised here will require a pretty wide range of proof.

Mr. Flynn: In that respect, your Honor, we have denied that there are no other schools teaching foreign languages.

We say that there are many schools teaching foreign languages, including our public schools.

Judge Denman: I take it that under the Act a tutor with three children under him, teaching them French or Portuguese or any other foreign language, will be a school within the Act.

Mr. Flynn: That is the way the term is defined in the Act.

Judge Denman: Yes.

Mr. Flynn: As a regular course of procedure.

Judge Denman: Well, if a tutor meets with the children a couple of hours or every night, it is a school within the Act as I now read it.

Mr. Flynn: That is correct, your Honor.

Judge Denman: Then there will have to be proof here that there are no other schools, if it be denied in the answer.

Mr. Flynn: Yes. I think that the Plaintiffs didn't intend that allegation to mean what it reads. I don't think they [fol. 256] are really concerned with that.

Mr. Wirin: May I say in that connection that it is likely that that statement is broader in its meaning than intended by the pleader? It is a matter with respect to which the Plaintiffs will give further consideration. But I will say to your Honors that generally Mr. Flynn and counsel for the Plaintiffs are agreeable to cooperating closely in eliminating issues from this proceeding in the form of procedural questions and collateral issues, so that the sole issue which will be tried by this Court is the Constitutionality of this statute both on its face and as applied. I am glad that your Honor called that to our attention, for it does say in effect the contrary to the position, the essential position, of the Plaintiffs.

Judge McCormick: Is that your attitude?

Mr. Flynn: Yes, that is substantially correct, your Honor. Since Mr. Wirin has more or less committed me to an answer today or the day after, I think we should be entitled to the use of the week end, and I will promise the Court to have our answer by Saturday, but if not, then by Monday.

Judge Denman: Well, what can we assume your answer will be? If we are going to commence trial, what is your answer?

Mr. Flynn: Substantially the same as our previous an- [fol. 257] swer.

Judge Denman: I would say that the statute is intended to cover the teaching of Latin and Greek.

Mr. Flynn: All foreign languages under the fourth grade.

Judge Denman: Apparently the assumption is that it is deleterious to one studying the English language. There is no Latin and Greek.

Mr. Flynn: In the first four grades, yes, your Honor.

Judge Denman: Suppose that a child has a very high I.Q. but is poor in the English language, as some of our great leaders of business are,—without a doubt of great intelligence—now, as I understand it, under this Act that child during the entire formative period, up to the age of fifteen, cannot take up the study of foreign languages in Hawaii.

Mr. Flynn: That goes a trifle farther. We have concluded a ruling from our office, the Attorney General's Office, in response to a request from the Department of Public Instruction, the effect of which is that the child after the fourth grade, to take up and continue the studies of foreign languages must only have passing grades in English equal to his own class and not to maintain any higher standard than is required to pass the fifth, sixth, seventh or eighth grade English.

[fol. 258] Judge Denman: Passing grades?

Mr. Flynn: All that is passing grades.

Judge Metzger: Now, if this amended complaint is allowed, accepted by the Court, will you, Mr. Flynn, move that your answer to the original complaint be considered the answer to this amended complaint, with the provision that you be allowed a certain length of time to amend your answer?

Mr. Flynn: I so move, your Honor, yes.

Judge Denman: Also plus your denial of these additional allegations concerning the parents and others who are joined. Is there any objection to this joinder, because I understand this is a new thing, the joinder of parents?

Mr. Flynn: It is new, definitely new.

Judge Denman: That is accepted by the Government?

Mr. Flynn: We will accept that joinder, reserving the right to make a full answer.

Mr. Wirin: May it please the Court, I thought that it might be useful to the Court and profitable to the lawsuit if I made an opening statement, in the course of which I will state not only generally the evidence which we propose

to adduce but also the positions of law and the claims of Constitutional law which the Plaintiffs intend to assert in the lawsuit, if that is agreeable to the Courts. And I shall try to avoid, of course, an argument on the law and limit myself to a statement of our position. And when the [fol. 259] time comes for argument, I shall try not to duplicate the statements I make now.

Judge Denman: The Court will accept the amended complaint with the understanding that the Defendants deny the essential allegations and are offering the same affirmative averments that appear in the original complaint. The joinder of the new parties is accepted by them, accepted by the Defendants, and accepted by the Court. Will you proceed?

Opening Statement for Plaintiffs

Mr. Wirin: We have filed the original of the amended complaint and have handed the clerk two extra copies so that each of the Judges of this Court might have a copy for his convenience. I think perhaps it might be useful in a brief word to discuss the import of the amended complaint and the issues which the amended complaint raises, or the different issues raised by the amended complaint, the differences in the issues raised by the amended complaint from those raised by the original complaint. With the addition of three additional parties, two are parents and one a teacher in a Chinese language—we think much of the procedural and collateral issues in the original complaint are no longer essential, for with the addition of those parties and with the allegations in the amended complaint that it is filed under Section 43 of 8 U. S. Code, the Civil Rights Code, and Title 28 U. S. Code, Section 41(14), which is the counterpart of the Civil Rights Statute and lodges [fol. 260] jurisdiction in District Courts to hear cases involving civil rights, then the matter of damages is no longer of any grave consequence, and the three thousand dollar jurisdictional requirement, and so forth, as a jurisdictional requirement or by way of proof is no longer necessary, necessary to the case.

Moreover, and this is perhaps of more consequence—the parents, it may be said, have an even greater interest or concern and right to appear than the language schools because, after all, language schools, whatever may be a language school—we'll discuss that a little later—the lang-

uage schools exist to serve people, and the parents are the people for whom the language schools exist. And so two parents have appeared in this case, and these parents both have children of ages which raise, we think, all of the facets of the statute. Here is what I mean:

The statute purports to draw some distinction between children before the fourth grade and children between the fourth and eighth grade, and then children after the eighth grade, so that children who do not attend the eighth grade are completely prohibited from attending any language schools. Children between the fourth and eighth grades are, so far as the face of the statute, not completely prohibited; they are required to pass a test in composition in the English language. Apparently, for some reason which hasn't yet been explained, the local Attorney General has [fol. 261] short-cutted that and deviated from the mandate of the statute which requires the passing by a child of a test in English composition and English and requires such passing every year, and the Attorney General has advised the school authorities that they need not comply with that provision of the statute but may permit children from the fourth to the eighth grade who merely receive a passing grade in English to attend a language school.

Judge Denman: What is this five point something, a degree of aptitude in English? Is it the English stated in the statute?

Mr. Wirin: Perhaps Mr. Flynn can answer it better than I.

Mr. Flynn: Five point zero is the grade normally required for a child who has passed the fourth grade. That is the average standard required by educators throughout the country in various departments of education throughout the country.

Judge Denman: Well, now, suppose the child is deficient in that and very high in everything else, will he be promoted to a new grade?

Mr. Flynn: Will the child be promoted in school?

Judge Denman: Yes.

Mr. Flynn: In the regular public schools?

Judge Denman: Here is a child who is of excellent mind but is deficient in English,—of very high standing in [fol. 262] mathematics and arithmetic—will that child be promoted with the deficiency in English, or must he stay in

one grade continually as long as he has an English deficiency?

Mr. Flynn: Well, I am sure that he will be promoted. Your Honor is asking me for a little extra data concerning the Department of Public Instruction, which I don't have. I know that there are many departments of their work concerned with corrective and remedial and helpful English, so that the end result is that all such children will definitely be promoted, not continued along in the same grade. Now, counsel has accused me of making an interpretation of the statute contrary to what it says; which we disagree with. The statute refers to standard tests in reading and composition. Now, the Department of Public Instruction already gives those throughout the entire grade school curriculum, and all that is intended is that the child in question, on taking those tests, shall attain a passing grade equivalent to the passing for the rest of his class. It does not necessarily at all mean that extra tests will be given to each child who goes to a language schools. The tests are already in the regular school curriculum throughout the eighth grade.

Mr. Wirin: However that may be,—to follow that inquiry just one step further—I would assume that a child who is highly proficient in all studies except English, and therefore a child who doesn't pass English but is so highly efficient [fol. 263] in other studies that he is entitled to and receives promotion from year to year, unless that child receives a test of at least five—of course, it is possible that a child may be highly efficient in other subjects and very poor in English and can't reach the score of five, even though he goes to the sixth, seventh or eighth grade, that child, even though in the eighth grade, would not be permitted to attend a language school, as I read the statute, because the five is the minimum which every child must achieve so far as an English test is concerned before that child may attend a language school. I don't know. That is one of the uncertainties and speculations which the statute makes possible, which in our opinion makes the statute vulnerable, because it is vague and indefinite. But that is to be discussed a little later. But what I was saying was that these parent Plaintiffs have children, some of which children are in grades less than the fourth, and hence under this statute cannot under any circumstance go to a language school. And then they have children, each parent has one child who is in a

grade between the fourth and eighth, and therefore may attend language schools if they pass the test, whatever that may be. And these parents are concerned about this, are concerned about their Constitutional rights, and do not want to submit their children to that restriction, so far as the right of these parents to send their children to a private [fol. 264] language school, outside of public school, of their choice.

Judge Denman: Have you brought these parents in as class representatives?

Mr. Wirin: And we have made a class suit so far as these parents are concerned in behalf of all parents similarly situated.

Judge Denman: That means those who desire to study Portuguese, French, Latin?

Mr. Wirin: That is so. In other words, if this statute is as broad as counsel claims it is,—and we concede that—then all parents, no matter their race, who desire to send their children to any private school where foreign languages are taught——

Judge Denman (Interposing): Are there parochial schools in your system?

Mr. Flynn: They are subject to our supervision.

Judge Denman: So a Catholic may send his child to a parochial school and will still be under this language limitation?

Mr. Flynn: Yes, your Honor.

Judge Denman: If they taught Latin or Greek, in any of these periods, it disqualifies the child?

Mr. Flynn: Yes, your Honor.

Judge Denman: Following the prohibition of the law?

Mr. Flynn: Yes, all private and parochial schools follow [fol. 265] that.

Judge Denman: I'd like to ask another question. Apparently there are allegations here that the standard of English is rather lower, the English attainment is rather lower at the same age than it is on the mainland. I gathered that somewhere. Is there any claim that that is due to a climatic lowering of capacity of the children to receive an education?

Mr. Flynn: No, that is denied.

Judge Denman: We assume that in this coming state the children are as highly inquisitive-minded as they are on the mainland.

Mr. Flynn: Right, your Honor.

Judge Denman: In other words, they are American citizens of average quality for the acquisition of knowledge.

Mr. Flynn: Yes, your Honor.

Judge Denman: Nothing of any specific climatic condition——

Mr. Flynn: Nothing of that sort.

Judge Denman: It's purely a language question?

Mr. Flynn: That's correct. That's our theory.

Mr. Wirin: Now, with respect to these parents, party Plaintiffs, they allege further that in the event they cannot send their children to a formal language school, that they desire and intend to teach their children in a group of two or more at home regularly the Chinese language, without [fol. 266] fee or compensation. This statute, in defining "school" in a word, defines a school as including any person who regularly, with or without compensation, teaches a foreign language to two or more persons. And so these parents thus also challenge that portion of the statute which defines "schools" and which contains such a sweeping prohibition and restraint upon the teacher of foreign languages. And the Attorney General has already conceded the broad scope of foreign languages which are included within the sweep of this statute. This statute enjoins these parents from teaching their children Chinese at home, as it would enjoin other parents from teaching their children if there are more than two, if it be French, teaching Latin and Greek, Scandinavian, or any other language, ancient or modern.

Judge Denman: Well, the Territorial system also would be covered by that, apart from the parent, because I understand your statute recognizes the place of the tutor in the family as substituted for the school.

Mr. Flynn: As a substitute for the school?

Judge Denman: Yes. Don't your school laws here provide for a family with a tutor that can give an education equivalent to school education?

Mr. Flynn: Yes, your Honor.

Judge Denman: So the Territorial system is, whether it is a family system, whether an uncle that comes in to teach [fol. 267] his sister's children Portuguese, and if he teaches regularly the uncle would be a school.

Judge McCormick: Mr. Flynn, I'd like to inquire a little into that. Is the tutorial system permissible to the same

extent as public instruction, as the public instruction system in Hawaii? I mean, can it continue indefinitely as a public instruction system?

Mr. Flynn: I can't answer that directly, your Honor. I have not come across it.

Judge Denman: Will you get us that statute and let us get it in the record? As I read the statute, it is a recognition of an individual tutor as a school. And where adequate and satisfactory to the school department, a tutor in the family can be a complete substitute for a school, for school attendance.

Mr. Flynn: Can be, yes, I think under certain conditions, your Honor.

Mr. Wirin: Are you through, Mr. Flynn?

Mr. Flynn: I believe the Court wants this section, the section on the tutoring system.

Judge Denman: We are trying to get a total picture of what you are alleging concerning Chinese parents, to cover your tutorial system as well.

Mr. Wirin: Well, I am satisfied from Mr. Flynn's statement that it is apparent that the claim is that this statute [fol. 268] is most sweeping and comprehensive in its coverage, and it will cover more or less formal language schools, will cover tutors, as it will cover also tutors at home, the father, with or without compensation.

Mr. Flynn: Well, I will concede that the statute definitely covers the tutorial system.

Judge Denman: Will you read it into the record?

Mr. Flynn: I don't find it under "tutorial" as such. I find private schools, how established. I believe that covers it. Section 1827, Revised Laws of Hawaii, 1945:

"Any person or persons desiring to establish a private school within the Territory shall, prior to the establishment thereof, make an application in writing to the department of public instruction, which application shall be signed by the applicant or applicants and shall state in substance (1) the name or names of the persons desiring to establish such school; (2) the proposed location thereof; and (3) the course of instruction and the languages in which such instruction is to be given."

Judge Denman: Well, could I have read an older statute in which the tutor is specifically mentioned?

Mr. Flynn: I think it is here, your Honor, but I have not found it yet.

Judge Denman: Because I had '35 and a later one. It may be that I read the "tutor" in the '35 provision, and it is not in your revision of '39, is it?

[fol. 269] Mr. Flynn: Forty-five. Section 1830 requires the attendance of children at either a public or private school, with certain exceptions. I may come across that here. Yes, an exception——

"When a competent person is employed as tutor in the family wherein such child resides and proper instruction is thereby imparted."

That's section 1830. It is as well in "Hawaii 1945."

Judge Denman: Well, that would fall, then, within the one person having two children under him in this present enactment.

Mr. Flynn: Yes, a tutor. I don't like to concede that as to a parent.

Mr. Wirin: They say that parents are the best tutors sometimes.

Mr. Flynn: I think we will concede that, too. I don't think that any parent will be enjoined from teaching his two or three children.

Mr. Wirin: I would assume the Attorney General has no authority to modify the expressed language of an Act of the Legislature.

Mr. Flynn: We have authority to interpret, your Honor, and we will use it.

Mr. Wirin: Subject to interpretation by the courts, of course. Now, we have just been discussing quite pointedly [fol. 270] the broad sweep of this statute, and that covers a private tutor as well as perhaps a parent. Now, it is noteworthy in this connection, your Honor, that the former statute which the Supreme Court set aside in the Farrington case, while in some special difference from this statute in that rather broad supervisory authority in local governmental officials over language schools—noteworthy that that statute, which as I say was annulled, defined schools and exempted Sabbath schools expressly, so that religious schools were clearly presumably protected by exemption from the sweep of that statute, whereas under this statute religious schools are clearly included. And therefore we will argue later, that it counted in the decision in the case

of Pierce vs. Society of Sisters, which protected religious schools from other schools.

And it is also noteworthy that the Nebraska statute which the Supreme Court annulled in Meyer vs. Nebraska, and companion cases, was not as sweeping in its scope as this statute, for those statutes expressly exempted Sunday schools, religious schools, and also homes. The very classification which was expressly exempted in the Nebraska statute, to make sure that it wouldn't cover the very matter which we claim this statute does cover, and appeared in the Nebraska statute, does not appear here, and yet the Supreme Court held that statute narrow, more carefully [fol. 271] drawn, attempting to protect the home at least from the broad supervision and invasion by the outside. The statute in the Nebraska case was also annulled.

Now, in addition to the Plaintiffs who are parents, there is now a Plaintiff who is a teacher by occupation, in this instance a teacher of a Chinese language by occupation. And so far as he is concerned, his appearance challenges that portion of the statute which not only applies to the teaching of foreign languages generally but which provides for the licensing of teachers. Under this statute one may not teach in any school—and "school" is defined broadly to include tutors, private tutors as well as fathers—but one may not teach under this statute regularly two or more persons any foreign language without having passed an examination given by a board, which examination includes proficiency in the idiom of English and in English idiom, whatever that is. So that one may not teach under the circumstances covered by this statute without getting the approval of the authorities not only that he is competent in the field which he is teaching, like Chinese or Latin, whatever it may be, but that he is of good character, that he is a person competent and suitable to teach children—that isn't involved in this at all in this statute—but that he be proficient in the idiom of the English language. And he challenges that.

Judge Denman: Let me ask you about that. Suppose here [fol. 272] is a child that speaks Chinese and there is no English-speaking person about. He knows the Chinese characters. Now, as I understand it, a Chinaman is a highly cultured person but does not speak English. He cannot teach the Chinese-speaking child the Chinese language?

Mr. Wirin: Precisely.

Judge Denman: Is that correct?

Mr. Flynn: I think it is, your Honor, yes.

Mr. Wirin: And, your Honor, he may not teach Chinese to the child, no matter the age or grade of that child, not merely the children under the fourth grade but any children at all, unless he gets the imprimatur, the approval of the authorities so far as his proficiency in English is concerned. And this Plaintiff teacher confessedly does not know English idiom or English at all very well. He does happen to know Chinese very well and taught it for many years and wants to resume his profession teaching Chinese.

Now, I have outlined the nature of the amended complaint and I want to say a few words now as to the nature of our claims as to the un-Constitutionality of the statute, so that your Honors will have it, at least our claims before you as the evidence goes in. Generally, of course, we rely heavily upon the cases which are familiar to your Honors, which have generally prevented states from interfering with parents' rights to educate their children, in general or in a private school, the Meyers and Pierce and Farrington [fol. 273] cases. It is to be noted in passing—this is quite important—that the statutes which were before the Supreme Court and which the Supreme Court annulled, though for the most part having for the object the maintenance of Americanism and patriotism, also had as an additional justification the claim that the teaching of language schools in those cases interfered with the health of the children. So that the claim which appears in the defining of this statute that health, so-called interference with health, or emotional conflict, constitutes a Constitutional warrantable basis for this kind of legislation, was implicitly stated in those cases, as it is expressesd in this case. And that is true both of the former statute in Hawaii, which the Supreme Court set aside in the Farrington case, and this. There one of the justifications for the statute was the protection of the health of the children, and that is true also in the Pierce and Meyers vs. Nebraska cases. In both cases the claim was made by the Attorney General for those states that the statutes were justified for health reasons.

Judge Denman: What would you say to this? Take the characters of the languages aimed at in the Nebraska case, and they are the letters of European languages, but here you have an alphabet of characters entirely different, a system beginning on the right-hand side of the page and

[fol. 274] moving to the left, reversing the system. Now, what would you say to that as presenting a condition not presented in the Supreme Court cases, unless it was presented in the earlier Farrington case?

Mr. Wirin: I have not had a chance to read the record in the Farrington case, so I will reserve answering that.

Judge Denman: Well, the fact existed regarding the two languages, that is, Chinese and Japanese as having entirely different characters.

Mr. Wirin: Precisely. But it seems to me there are also these answers, if I may make them. In the first place, for the purposes of your question,—the Court is suggesting that this statute is aimed exclusively against Chinese and Japanese—it is now conceded that it is aimed at all foreign languages, and on its face that distinction is no longer valid. I don't know whether the Court knows it or not but the Jewish characters, the Hebrew characters in the Bible—and I'm not an authority on either—read backwards also. And it has not been suggested yet by anyone that Jewish boys who attend Hebrew school and learn the Bible in Hebrew, because the characters go the other way, that they necessarily have a serious emotional strain and bad health as the result therefor. At least I won't concede it for myself. Moreover,—and I was going to say it later but I will say it now—we believe that such careful research as there has been done in the field of bilingualism generally, and [fol. 275] bilingualism and the language school, in this community discloses that neither bilingualism on the one hand nor the attendance at foreign schools, including Chinese and Japanese, result in anything that approximates any serious emotional strain by virtue of the difference in the language. That may be an issue of fact with respect to which your Honors may be interested. In any event, our final answer is that even if there is some emotional strain in children of Chinese and Japanese parents, assumedly loyal to this country—and their loyalty has been pretty much demonstrated in the last war—even if there is some such emotional strain, that that is a consequence of comparatively little consequence in contrast with the greater Constitutional right of issue of protecting the citizen, all citizens here, the parent in his right to determine the education of his children. For if that were not so, the same argument could be made essentially that it is an emotional strain for Catholic parents to send children to a parochial

school who are residents of a Protestant community. And that same argument would permit all kinds of intrusions upon the private lives and the opinions of American citizens, which thus far at least our Constitution has not permitted.

Now, I don't know whether that answers it. At least that is my view of the matter on the particular question [fol. 276] your Honor asked. But with particular reference now to this statute and its comparison with other statutes, similar statutes which have been held un-Constitutional, there is this further rather important thing to be said: The statute which the 1923 Territorial Legislature enacted, and which was annulled by the District Court, by the Circuit Court of Appeals and the Supreme Court of the United States in the Farrington case, was not at all as sweeping in its prohibitions. I am talking now about the matter of not what is a school but another matter. That statute in effect enjoined the teaching of foreign languages to children up to the fourth, under and up to the fourth grade. This statute goes beyond that, for it encompasses within its sweep children up to and including the eighth grade. It is true that it purports to draw some kind of a distinction between children. In the fourth grade and down they are completely prohibited from studying foreign languages. Children from the fourth to the eighth grade may be permitted to do so upon getting the certificate. But the point is that the first statute was much less sweeping so far as the ages of the children who were concerned. And that is a critical matter in this case.

I have already called your Honors' attention that that statute is more sweeping than the Nebraska statute in that the Nebraska statute expressly exempted homes and paro- [fol. 277] chial schools which this statute does not.

Judge Denman: Have you made a study of the statutes in the other Nebraska cases, three other cases that came up, or two other cases at that time?

Mr. Wirin: Yes.

Judge McCormick: Bartels?

Mr. Wirin: Yes.

Judge Denman: Have you compared those statutes?

Mr. Wirin: Yes, I have. These statutes, the statutes other than the Nebraska statutes, in effect dealt with the eighth year, barred the teaching of foreign languages under eight years. Now, that brings me to another point, to

another little different consideration. We think this statute is un-Constitutional because it is vague and indefinite, at least in the following respect: Nowhere does this statute define the words "foreign languages." It uses it. The statute uses the word "English". But nowhere is "foreign language" defined. Now, that's a very extraordinary and interesting thing for this reason: All the other statutes which were set aside by the Supreme Court, both in the Nebraska and companion cases and the Farrington case—which was passed by the Legislature here—did not use the vague phrase "foreign language". The Farrington statute talked about schools conducted in any language other than the English language or Hawaiian language. So you could [fol. 278] gather generally what languages were meant—all languages other than Hawaiian and English. The statute in the Meyer case and companion cases——

Judge Denman (Interposing): Well, that's in the definition here, "Any language other than the English language" as a course of study.

Mr. Wirin: Are you reading the statute here?

Judge Denman: Yes, Section 1872, definitions. Have you got your amended complaint there?

Mr. Wirin: I have it.

Judge Denman: "School" means any person, and so forth, that teaches "any language other than the English language, as a course of study."

Mr. Wirin: That doesn't quite meet what I am saying. In other words, this section 1872 defines "school". And that section means that all schools, as defined by the statute, come within the meaning of this law, namely, all places which teach other than the English language. But later on the words "foreign language" appear. In fact, it appears I think for the first time at least in this statute in Section 1873.

Mr. Flynn. 1871.

Mr. Wirin: And 1871.

Judge Denman: Did you have any difficulty in interpreting that, in view of 72?

[fol. 279] Mr. Wirin: Well, let's see if I can clarify my thinking and say what I am trying to say. The word "school" includes every place where a language other than English is taught.

Judge Denman: Well, 73 is foreign language. Any school, it says, other than the English language. "Other" will be

construed, and is perfectly plain, as including Latin and Greek, Sanskrit, all of them.

Mr. Wirin: Does it include Hawaiian?

Judge Denman: Yes, it does. It's different from the other statute.

Mr. Wirin: Does this statute bar the teaching of Hawaiian in schools on the ground that Hawaiian is a foreign language? Let me develop that a moment. The Attorney General says that it does. The Attorney General says that this statute covers the teaching of every language other than English, because every language other than English is within the meaning of this statute a foreign language. Is Hawaiian a foreign language? There are many who might say that Hawaiian is less a foreign language than is English in this community. The point of it is that if the Attorney General says that it does include Hawaiian, that is, that foreign language includes Hawaiian, and this statute doesn't define what is a foreign language, and as a matter of speculation as to what is a foreign language to be determined by the Attorney General presumably in the first instance, then the statute on its face, for failure to define [fol. 280] foreign language, is so broad as to be too vague and indefinite to stand up under Constitutional attack, under the numerous cases which hold that a statute which impinges upon substantial rights must be specific and clear in what it prescribes. And I don't think, your Honor, that the use of the word "English" in Section 1872 in defining "School" detracts from the force, if any, of my argument that "Foreign" is not defined and hence may or may not include Hawaiian or other languages. Now, that is important perhaps because it is noteworthy that in the other cases, both the Farrington case and the Meyer versus Nebraska case, the phrase "Foreign language" is not used, but the phrase "English language" is used specifically. And then it is clear that all other languages other than English are covered by that statute.

Judge McCormick: Well, the Supreme Court in the Farrington case, as I remember, Mr. Wirin, made an exception with respect to what it termed the large alien population in the Hawaiian Islands. Wouldn't that justify some consideration as to the teaching of the Hawaiian language?

Mr. Wirin: Are you suggesting, Judge McCormick, that the Hawaiian language would not come within the same category as other foreign languages?

Judge McCormick: Yes.

Mr. Wirin: I agree with that, your Honor. But am [fol. 281] saying that this statute is so broad that it may be deemed to include the Hawaiian language. And I understand the Attorney General to claim that it does.

Mr. Flynn: Yes, it does, your Honor.

Mr. Wirin: And if it does, then it includes the language which the citizen speaks as well as the alien, and it doesn't meet the problem which the Supreme Court was excepting as a specialized problem, namely, the problem of the alien in this community.

Judge McCormick: Well, the Court said, "We, of course, appreciate the grave problems incident to the large alien population in the Hawaiian Islands. These should be given due weight whenever the validity of any Governmental regulation of private schools is under consideration. But the limits of the Constitution must not be transcended."

Mr. Wirin: In other words, your Honor, if this statute was designed to meet a problem in connection with the alien population in this community, then this language by Justice Reynolds would have application. But this statute, as claimed and conceded by the Attorney General, isn't limited to aliens, isn't limited to Chinese or Japanese. It applies equally and broadly to citizens and aliens, and to all languages other than the English language, including the Hawaiian language. And, therefore, it isn't the kind of a statute which the Supreme Court often talks about, of a [fol. 282] statute narrowly drawn, designed to meet a specific so-called evil. It is the kind of a statute which the Supreme Court condemned in Thornehill versus Alabama, that it was a statute sweeping in its scope and including innocuous and innocent conduct as well as alleged evil conduct, and hence, because it included both, was vulnerable Constitutionally.

And there was this additional principle which I think the Court is familiar with, and that is; that in these cases involving the challenging of a statute because the statute infringes on civil liberties, the courts will do two things: first they will look upon the statute upon its face, and if the statute upon its face is capable of an unfair enforcement, if it is too broad in its sweep, although it will cover some groups which ordinarily might be the subject of specialized legislation, then the entire statute is thrown out. That took place in Stromberg versus California, involving the

red flag law; it took place in effect in the Thornehill case, which prohibited both peaceful and violent picketing. If the statute had merely prohibited violent picketing, the statute would have been valid. But where it prohibited peaceful and violent, including violent as well—it could have been against violent—the statute is on its face unconstitutional.

And then there is a question which your Honors will have to consider, and that is, what is the proper standard to apply [fol. 283] in appraising this statute so far as its Constitutionality is concerned? Does the statute come to this Court armed or buttressed with the presumption of its Constitutionality; or is this the kind of a statute which, because it interferes with great freedoms, comes to the Court, as I think the Supreme Court has put it some time, as a sort of a suspect with the burden upon those who justify the statute to demonstrate its reasonableness and justifiableness? Clearly, if this were a statute which enjoined picketing or speech, it would be a statute with respect to which the burden would be upon the Defendants to show a clear and present danger of some serious, great, irreparable and imminent harm which would befall the community if this statute didn't take place. It is our position that the proper test is the clear and present danger rule, and that this statute doesn't have the presumption which some statutes affecting business enterprises have. However, irrespective of where the burden of proof is, we intend to adduce evidence affirmatively, intend to follow some suggestions made by Judge Denman a long time ago, in 1935, in an article in the American Bar Association Journal, in which he instructed lawyers how to try Constitutional cases, to make sure that all of the material issues of fact were properly presented to the court.

And so we shall affirmatively challenge the findings in this [fol. 284] statute, and we shall try to demonstrate by competent witnesses that the findings are without support, the findings being sort of two-fold: one, that the knowledge of a foreign language and knowledge acquired through language schools of foreign languages has a two-fold effect—that it affects the health of children—this is the finding of the statute—and that it retards children in their progress through the grades. We intend to challenge both those findings.

Judge Denman: I'd suggest, Mr. Wirin, that you go beyond the composition of the Judge advising the Bar Associa-

tion and cite the Supreme Court cases, limiting the area of inquiry where there has been a statutory finding. Just how far can you go, that you can claim you can go, proving that the finding of a legislative body is not true? What cases do you rely on, apart from that highly significant article, of course?

Mr. Wirin: Yes. The cases—Borden's Company against someone—I have it here—the key case, as I apprehend it, is Borden's Farm Products Company against Baldwin, in 293 U. S. 194. Then the other cases, including Chastleton Corporation against Sinclair, in 264 U. S. 543. In a word, there *there* was a finding by the District of Columbia—it was a case involving housing during the first World War—there was a finding by the District of Columbia that there was a grave emergency which would require the enactment of legislation——

[fol. 285] Judge Denman (Interposing): Yes, there it was whether the emergency continued, necessarily a matter that had to be found.

Mr. Wirin: Now, another case is the case of Whitney against California, in 274 U. S. There the question was whether or not the findings by the California Legislature that numerous persons, particularly members of the I. W. W., were going about destroying property in California,—there Justice Brandeis stated that whether or not that was true was an issue of fact which those who challenged the statute should meet, and on failure to meet it in that case Justice Brandeis was compelled to concur in the case. And then there have been other cases since then. The best language is probably by Justice Brandeis dissenting in Jay Burns Baking Company against Bryan, in 264 U. S. 504 at page 517.

Judge Denman: Will you cite these to us later?

Mr. Wirin: And then there are some articles by Justice Frankfurter, which I think preceded your Honor when he was professor at the University. I shall be through in a moment. I was longer than I expected. So we shall try to challenge the findings, and we shall offer some affirmative evidence that the languages have been not harmful but they have been in many instances helpful. They have helped maintain the integrity and harmony in the homes of persons, original aliens in this community, Chinese, because the [fol. 286] Chinese aliens have not been able to speak English well, and it has been helpful in maintaining the harmony

of the home for the children of such parents to be able to understand a little of the culture of their parents; and a good deal of the language of their parents, both of which they acquired in the language schools; that particularly in this community the knowledge of a language other than English, and perhaps even in addition to Hawaiian, is a useful thing, because so many persons in this community do not speak English, those of older generations. And in order profitably and conveniently to conduct business, it is desireable in many instances to be able to speak an Oriental language.

And finally it is our view that even if we fail completely in challenging the correctness of the findings, that the findings do not carry support for the Constitutionality of this statute. And here is what I mean: If it is the purpose of this statute primarily to preserve the mother tongue, English, the King's English, mother tongue English—and that was the purpose of the Nebraska statute—then that purpose is not a legitimate purpose justifying the invasion of the rights of the parents and the children and justifying the broad and sweeping prohibition this statute contained. In other words, findings to justify a statute must be findings of fact which, if true, warant the particular statute enacted. Let me give your Honors one example and I shall be done. [fol. 287] Supposing in connection with the cases involving the flag saluting there were findings, as there were by the legislature, that participating in a flag salute resulted in loyalty, patriotism and devotion to the country; and a further finding that devotional loyalty was a great common good. That kind of a finding would not support the compulsory flag salute, because at least in the flag salute cases the Supreme Court finally decided the right of individual freedom, the right to be free from such coercion was so great and important a right that it cannot be abridged except upon need of greater than even the unity and patriotism that comes from participating in the flag salute.

In other words, the findings must find an evil so serious that the particular statute is designed to meet, and unless that evil is so serious, a statute taking away important rights is, none the less, found at fault. And here is what I have in mind: In other words, I am hopeful that when this extra testimony comes in, that this Court will not get the impression, at least from me, that it is necessary for you to determine necessarily and inevitably which experts are more correct in the field of education or psychology or sociology,

because in the second flag saluting case the argument was made by Justice Frankfurter and by the American Legion and others that after all the Judges were not competent in the field of education, that there was a difference of opinion [fol. 288] among educators as to whether flag saluting did or did not result in good health of the citizen, if not of the community, and therefore the Judges should not determine that issue; but there being a difference of opinion, to leave the states to experiment with the matter for themselves. And Justice Jackson said:

"It isn't a question of our competency in the field of education. Our job is to interpret the Constitution. And whether or not we are as expert in education as others, or whether we are experts or not, is not the point. We can not escape the obligation of interpreting and applying the Constitution, no matter whether there is a difference of opinion among the experts."

And that is our view in this case, that even though there may be a difference of opinion upon these matters, that these findings are not the kind of findings of a serious social or public evil which warrants an invasion into the right of the parent over the child's education.

Now, I have made more of an argument than I had expected, but that is our position. I was going to suggest that we'd like to know the position of the Attorney General. We thought that the Court and Counsel, too, would be in a better position to adduce evidence if we all knew the conflicting contentions or claims.

Judge Denman: Well, he has denied your contention that [fol. 289] there are only Chinese and Japanese schools. We will take a recess for ten minutes.

(A short recess was taken at 10:20 a. m.)

After Recess

OPENING STATEMENT FOR DEFENDANTS

Judge Denman: Proceed.

Mr. Flynn: Our statement, if the Court please, will be very brief. As your Honor has already indicated, at the outset we challenged many, if not all, of the essential allegations made by the Plaintiffs. We would like to call the Court's attention and emphasize the allegations in our legislative findings to the effect that the study and per-

sistent use of foreign languages is in general harmful to the children, and particularly harmful to them in their progress in the public or private schools, their regular schooling. Now, we intend, when our case is to be presented, to show that there is a very wide-spread and very serious language-deficiency here in the Territory of Hawaii. We intend to show also that our law is reasonable and workable in its intention to correct this existing condition.

We definitely feel that the police power of the Territory, similar to that of a state, is sufficient to make certain rules and regulations concerning the education of the children who are to assume both the privileges and duties of citizenship of the community. And certain matters we would like to state now are not involved at all. The matter of the alien [fol. 290] population is not concerned in this case. The alien population now happens to be very small. Our citizen population is somewhat over 85 percent of the total population. The question of the alien group comes in only indirectly. We will show that because of the large alien population for many generations there has developed here in the Territory the serious English deficiency which I have mentioned, and that that deficiency is continuing. It is emphasized, we believe, in our residents who are of Oriental ancestry. The conditions to some extent extend to other national groups, such as Portuguese and Hawaiian and Puerto Rican, and other people of Polynesian race. So that in our grade schools, and even into our University level, there is such a serious English deficiency that the progress of our students is seriously impaired.

And from that we believe an inference is justifiable that their full attainment of the status of citizens who contribute both to their own welfare and to that of the community in general——

Judge Denman (Interposing): Is that deficiency that you speak of based on the comparison of the efficiency in the mainland?

Mr. Flynn: That is a part of it, your Honor, yes.

Judge Denman: What do you mean by "deficiency"? There would have to be a comparative method with the main- [fol. 291] land teaching, and therefore there arises the whole question of pedagogy as to whether your teachers here are as competent as on the mainland. For instance, take the primary grades in school. Now, your requirement for the preparation of teachers corresponds to the require-

ment for the preparation of teachers on the mainland, and that should be the basis of your comparison.

Mr. Flynn: Very definitely so, your Honor.

Judge Denman: Does your law still permit a high school graduate to teach in the schools?

Mr. Flynn: No, your Honor. He has to go to the Teachers College in the University of Hawaii. Formerly it was the normal schools.

Judge Denman: That old provision has been changed so that you now have to have both?

Mr. Flynn: I hate to commit myself on the Territorial statute that way because I have not read it. I do know that the general rule there—and I feel sure that the statute therefore requires it—is that the teacher attend our Teachers College at the University, which is the successor to the old Territorial normal school. And in that same connection we will show—and this cannot be controverted—that our Teachers College places more emphasis and work on English and English studies and English teaching methods than any other teachers college in the United [fol. 292] States, in any normal school, for the reason that the problem here in the grade schools is so serious that they must concentrate on that, and they do.

Now, we'd like to make only a brief reference to some of the other cases mentioned by counsel for the Plaintiff. Our own 1923 statute is dissimilar almost essentially from our existing statute. The basis at the outset is different. The basis there was the matter of Americanism and cultivating and inculcating American ideals. That, at the most, is very indirectly connected with our present case. We are referring not to what is taught in the language schools but how their teaching is done. And it is the language itself. And it is our contention that that condition interferes with the progress of our children in our regular schools.

Now, the Meyer case, the Bartels case, the Ohio case—I believe it is Bowling versus Ohio. I am quite sure it is confined to the question of German. Now, that in itself is a discriminatory thing which the Supreme Court can readily grasp upon, or any court. We refer to all foreign languages. And we refer to our existing language deficiency—English. And English is required to be taught in all of our public and private schools; whether it is a tutor or a private school, they comply with the general requirement for the

public schools. And we say that foreign languages, particularly the Oriental because of the ideographic matter, [fol. 293] the differences in the reading and writing, and the associated questions of that kind, are indeed harmful to our children. That is, as of the sixth grade our student tests show that they are approximately on an average one year behind students in the same age and grade on the mainland.

Judge McCormick: May I ask you a question?

Mr. Flynn: Yes.

Judge McCormick: Supposing the statute had specifically designated the interdictive languages as Oriental languages, wouldn't the case come clearly into the Bartels decision?

Mr. Flynn: I believe that was so considered, your Honor. And I believe there was some doubt or uncertainty about that. And our Legislature, therefore, tried hard to draw up a law that was Constitutional, that would have general application and no discrimination. But they were entitled, I believe, to refer to the existing condition in this Territory, which has been only that Oriental languages have been taught, Chinese and Japanese. There had been Korean until 1940, but that's a small segment of our population. They had all been discontinued prior to the time of the war.

Judge Metzger: All foreign languages have been out of operation for about five years?

Mr. Flynn: Almost six years.

Judge Metzger: Six years. Is there any noticeable im- [fol. 294] provement?

Mr. Flynn: Some of our witnesses think so, definitely.

Judge Metzger: Since that time?

Mr. Flynn: Some of our witnesses think so.

Judge Denman: That will be shown in your averages?

Mr. Flynn: That will come into our evidence, yes, your Honor. Now, I don't think I should take any time concerning the vagueness and indefiniteness alleged to be attributable to our definition of foreign languages. I will concede right off that Hawaiian is included and that all other foreign languages are included, and that we can all be agreed as to how to proceed on that point; English is English and all of the other languages are foreign. Not pidgin English, but all other languages are foreign. In that connection I might say that the majority of educators, very

substantial majority we feel from extensive research, agree with our contention that the teaching of any foreign language should be postponed beyond the first few grades of the child's school career. And Hawaiian would definitely be included within that. Hawaiian is now a foreign language to a vast majority of our Hawaiian population. It is being spoken around the homes and in a few neighborhoods by a very small percentage. And in that connection, until the last year or two Hawaiian has been taught in a couple of our public schools which had been located in those [fol. 295] districts. And the teaching had been postponed to beyond the fifth grade on the theory that the child can better absorb that learning, that language learning, after several grades of school than he could if he were to start at the same time that he starts his English study, namely, the first grade.

Now, the rest of our matters, if the Court please, we believe are well-stated in our answer, and I don't think we need to waste any more time on it now. We would like to hear the Plaintiff's case.

Mr. Wirin: Your Honor, may I have just one word in connection with the Hawaiian? I don't want it to be the point of argument in the case, but I want to call the attention of the Court to Section 1826 of the Hawaiian statutes which, as I understand, provides that the English language is the basis of instruction. It continues to provide, however, that the Hawaiian language shall be taught in addition to English in all normal and high schools of the Territory; and continues to provide that daily instruction for at least ten minutes in conversation or, in the discretion of the department, in reading and writing in the Hawaiian language shall be given in every public school conducted in any settlement of homesteaders under the Hawaiian homes commission. Now, it is difficult for me to apprehend the position taken by Mr. Flynn that in the face of that statute, which formally recognizes Hawaiian, which requires the [fol. 296] teaching of Hawaiian in certain schools, that Hawaiian is under this instant statute being challenged as a foreign language; for, it seems to me, that there is recognition by the Legislature, at least formerly, that Hawaiian, though not quite on a par in dignity and full recognition with English, none the less is recognized as a domestic language, which of course essentially it is, rather than any foreign language within the broad but undefined meaning

that "foreign language" is given in the statute which is being challenged.

Judge Denman: What would you say if the Court would arrive at the conclusion that any language that was not English is foreign within the meaning of that statute? Would you say that was utterly irrational as an interpretation? I am not indicating we are going to do that.

Mr. Wirin: I think "utterly irrational" is a very strong way of putting it. I would say it was an erroneous interpretation. I believe lawyers have a right to be utterly irrational—very rarely.

Judge Denman: Of course, there are petitions for rehearing on that very often.

Mr. Flynn: If your Honor please, Mr. Wirin mentioned this statute to me before, and I didn't recall what the circumstances were concerning it. I now recall it. It just occurred to me that that provision was intended to provide the teaching of Hawaiian whenever there is a demand for [fol. 297] it, and it has been done. In other words, the school in the homestead areas, which is the same one I had reference to a minute ago when I was thinking of it, the homestead area being almost entirely a Hawaiian population, that law requires that they make the teaching of Hawaiian available, which they may have done. It doesn't require that they take all the pupils and teach them ten minutes of Hawaiian. That has been so construed by the Department of Public Instruction. And the teaching that has been done has been beyond the fifth or sixth grades in the grade schools.

Mr. Wirin: What I can't understand—perhaps this Court will clarify it—is how a language which was spoken by and taught by the inhabitants of this area prior to the teaching or speaking of any English, how that language can be called a foreign language? It seems to me as a matter of common sense that it is the original domestic language as distinguished from a foreign language. Now, it can be argued as between Hawaiian and English that English is the foreign language. However, English has been recognized as more or less the official language, and therefore it has become domesticated here. But that doesn't transpose the original domestic language, Hawaiian, into a foreign language. And under Mr. Flynn's interpretation of this statute that claim can be made,

namely, that the language school statute does prescribe the teaching of Hawaiian on the same basis as it prescribes the [fol. 298] teaching of French, German, or any other language other than English. But, of course, this entire matter is not central to the major issue in the case, and we are ready to proceed with the evidence. Before I do so, however, I'd like to ask leave of the Court to strike from our amended complaint an allegation which is improvident and which, as it appears, is probably inaccurate, and that is in paragraph 12 of the complaint, the recital that there are no language schools in the Territory of Hawaii that teach any foreign language regularly other than said Chinese and Japanese language schools. What was meant by that was that there were no language schools that teach nothing but languages. But that isn't the issue in this case anyway. So we move to strike it, we ask leave of the Court that that be stricken.

Judge McCormick: Any objection, Mr. Flynn?

Mr. Flynn: No objection.

Mr. Wirin: I will save counsel the trouble of denying it.

Judge Metzger: Well, perhaps you had in mind incorporated schools.

Mr. Wirin: Well, what I had in mind is not important.

Judge Metzger: All right.

Mr. Wirin: We are ready to call our first witness, but before I do, Mr. Flynn has been good enough to furnish us, to let us see a schedule which recites the number of Chinese [fol. 299] pupils by grade schools who attend private schools, not language schools, who attend private schools, as of June '46 and December '45, a list of Chinese students who attend private schools, none of these schools being, of course, Chinese language schools, for they have been closed since the declaration of martial law. And I would like to offer that in evidence. And I understand there is no objection.

Mr. Flynn: No objection. The document happens to give the number also of students of Chinese ancestry in the public schools.

Mr. Wirin: Yes, it does.

Mr. Flynn: Public and private schools.

Judge Denman: Schools designated as of character, whether they are parochial or otherwise?

Mr. Flynn: No, under the statute all schools are either public or private for statutory purposes. We have a great

number of private schools, both parochial and other privately operated schools.

Mr. Wirin: Mr. Flynn has been good enough to assure me that the statistics are available of the private schools, which are parochial and which are otherwise, and those statistics will be furnished to the Court.

Mr. Flynn: I am not quite sure that I can distinguish between parochial and other private schools. I can get the total figures of all the pupils in the schools other than public [fol. 300] schools.

Mr. Wirin: And I understand there are very large proportions of children in the area.

Mr. Flynn: My estimate is that it is quite substantial, between a quarter and a third. That's only a guess.

Mr. Wirin: We are ready to call witnesses, your Honor.

The Clerk: This is Plaintiff's Exhibit "A".

(The document referred to was received in evidence as Plaintiff's Exhibit "A".)

Mr. Wirin: Call Mr. Thom.

WAH CHAN THOM, a witness in behalf of the Plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Wirin:

Q. What is your name, please?

A. Wah Chan Thom, W-a-h, C-h-a-n, T-h-o-m.

Q. You are one of the Plaintiffs, one of the persons who are suing in this case?

A. Yes.

Q. Where do you live?

A. I live in Honolulu.

Q. Where were you born?

A. Born in Honolulu.

Q. Are you an American citizen?

A. Correct.

[fol. 301] Q. When were you born?

A. Born in April 4th, 1903.

Q. Have you had any education in the public schools of the Islands?

A. Yes.

Q. What education have you had?

A. I attended the University of Hawaii. I attended the Chinese language schools.

Q. Did you attend the grade schools of Honolulu?

A. Yes.

Q. What other education have you had?

A. I took postgraduate work in Northwestern University.

Q. Northwestern University on the mainland?

A. On the mainland.

Q. Will you try to keep your voice up, Mr. Thom, so we can all hear you, please? What is your present occupation or business?

A. I am the manager of the Nu-Enamel Company, Honolulu.

Q. What kind of a business does that conduct?

A. The company sells paint products, sporting goods and toys.

Q. Do you have any family?

A. Yes.

Q. What does your family consist of? And spell any names that you give for the reporter.

[fol. 302] A. My wife, Jannie Thom, J-a-n-n-i-e, Thom; Wing Han Thom, my daughter, W-i-n-g, H-a-n, Thom; and Chu Seong Thom, C-h-u, S-e-o-n-g, Thom; and Roland Thom, R-o-l-a-n-d, Thom.

Q. How old is Wing Han Thom?

A. She's thirteen.

Q. And what grade is she in school?

A. She's in the seventh, going to the eighth.

Q. How old is Chu Thom?

A. Chu Thom is eight.

Q. And in what grade?

A. Third grade.

Q. And how old is Roland Thom?

A. Roland is three years old, at home.

Q. Going to school yet?

A. At home.

Q. Now, how long did you attend a Chinese language school or schools?

A. Six years.

Q. And in a general way what did they teach you at the Chinese language school?

A. They taught me to write the Chinese characters, to read, study history of China and to read a little classics.

Q. What language did your parents speak at home?

A. Chinese.

Q. Or otherwise?

[fol. 303] A. Chinese language.

Judge Denman: Pardon me, what Chinese language, which one of the 17 or 18?

The Witness: Cantonese, your Honor.

Q. Did your study of Chinese in the Chinese language school retard you in your study of the English language in the English grade schools?

A. Not that I remember.

Q. Did your study of Chinese in the Chinese language schools retard you in your progress through the grade schools?

Mr. Flynn: I think I want to object, your Honor. I don't think the witness is competent to testify about that.

Mr. Wirin: I think he is probably in a way the most competent person to testify. He is the person involved. He is the Plaintiff, to be sure, but he would know, and he may be cross-examined about it.

Judge Denman: Well, now, suppose you have a thousand such persons testifying, and your statistics are based upon averaggs, wouldn't you be required to prove somewhere or other that this was an average person, and all those others are average persons? I mean just where would we land with this line of testimony?

Mr. Wirin: Well, if it continued interminably—

Judge Denman: Apparently here is a very intelligent man, a man of higher education, who says that he was not [fol. 304] retarded. Your opponent would claim that everybody is retarded, or that the percentage of retarded persons is very high. Persons with exceptional ability would be able to get away with both languages. Now, just how would this testimony be relevent unless you prove that this is a retardable person?

Mr. Flynn: If your Honor please, I have a further ground on the same objection, and that is that evidence of this type should come from the witness' records, or his teachers' preferably, to say whether he was retarded or not.

Mr. Wirin: In the first place, it is not our purpose to prove our case conclusively through this kind of evidence. It occurred to me to put on some evidence by some persons for this record—

Judge Denman: The best evidence as to what happened to him as a child in his capacity is from the records of the school.

Mr. Wirin: With respect to that, I do not agree that that is the best evidence. I think that is some evidence. I think a person who is injured may testify as to the nature of his injury, though there may be more authentic records in the form of hospital records, reports, which will describe the injury more fully. And a person who is the subject of certain experiences may testify about those experiences, or there may be other records which also contain evidence [fol. 305] pertaining to that experience.

Judge Denman: I imagine you will stipulate, wouldn't you, that maybe fifty, a hundred persons, will testify as this man testified?

Mr. Flynn: I will stipulate that fifty or a hundred can testify that they were not retarded.

Judge Denman: Yes.

Mr. Flynn: I can also state that that testimony isn't competent. I think it is the teachers and the school authorities and the doctors and maybe the parents who can testify as to their own children. I don't think he can testify as to what he did in the fifth or sixth grade. He can testify as to what he did—

Mr. Wirin: It was my purpose to make this testimony quite brief. I appreciate that it doesn't prove the entire case. But I thought there ought to be somewhere in this record the testimony of a few witnesses presented to the Court who will testify pertaining to their experiences in language schools and the effect of language schools upon them as they know it, subject to cross-examination. And then we will move on to expert witnesses thereafter.

Judge Denman: What was the last question?

(The reporter read the last question).

Judge McCormick: I don't see very much analogy between an injured person in a tort case, Mr. Wirin, and this ques- [fol. 306] tion. I would see some analogy if the question were asked him as to certain mental processes.

Mr. Wirin: I won't press the question at this point. Then I will withdraw it.

By Mr. Wirin:

Q. Now, state whether or not you are conscious of any emotional disturbance or any effect upon you mentally in the form of emotional disturbance, as the result of your attendance at foreign language schools?

Mr. Flynn: I want to make the same objection, your Honor. I don't quite agree with Judge McCormick as it being applicable in this situation any more than this other question. It is not the best evidence.

Judge Denman: Of course, your contention is that those disturbances are created.

Mr. Flynn: We contend that the child himself in the fifth and sixth grade is not the judge of any disturbances.

Judge Denman: I imagine we will have experts telling us about that, and we will have to draw the distinction between the emotional disturbance of mastering a problem in mental arithmetic standing before the class, and this mental disturbance that the statute speaks of.

Mr. Flynn: To us it is a very general term, mental disturbance. I feel that testimony concerning that of any particular child, or many children, is not beneficial when [fol. 307] the testimony is only of the child himself. It is a rare person who will ever concede that he was mentally disturbed at the age of eleven. We will not think of that. Maybe our teachers or doctors can say that we were. And I therefore think that the testimony from the witness himself is not competent to establish that.

Judge McCormick: I think he can testify as to his emotions and sensations. Sometimes that is more reliable a source of information than from a psychologist or a psychiatrist. I think, however, that perhaps we are relegating the best type of evidence by this line of proof. It seems to me that there ought to be records and standards of efficiency that are recognized by the schools, the educational system, to be more reliable than evidence of this character.

Mr. Wirin: I may say to your Honor that it is my understanding that with respect to the matter of so-called emotional disturbance, and that phrase as used in the statute, my information is that there are no studies made upon the subject and there are no records. Moreover, it wasn't our

purpose in producing this kind of testimony for a very short period to relegate the other testimony completely out of the window, but I thought we made a kind of a preliminary picture before your Honors in broad strokes and in short compass, and then go to so-called experts and see if they can help the Court.

Mr. Flynn: We might be able to agree somewhat to save [fol. 308] some time, your Honor, if this witness were to testify that he had good grades throughout his grade school career. I'd have no objection to that at all. I wouldn't even ask him to prove it. Or something to that effect. But he asked him, when he was going to both schools was he mentally disturbed? I want some older person who observed him to testify.

Judge Denman: Suppose he wasn't, and didn't make good grades, wouldn't it be pertinent?

Mr. Flynn: It would be pertinent if testified to by some competent party who observed him, not his own reflection now as to what he went through at that time.

Judge McCormick: I don't believe that the testimony of an observer is the best evidence.

Judge Denman: We'll allow the question.

A. Well, my answer would be No. I don't recall any disturbance.

Q. Now, as to the effect upon you with respect to the result upon you of your attending Chinese language schools, tell us whether or not there was any result so far as your relationship at home to your parents were concerned, resulting from your knowledge of the Chinese language which you acquired in the Chinese language school?

Mr. Flynn: I don't think it is competent and material, your Honor. The law has nothing to do with relations to parents at home.

[fol. 309] Mr. Wirin: Hasn't it? In the first place, we contend that it does. And in the second place, we hope to show that; that not only was there no mental disturbance or retardation in school, but that there were affirmative advantages.

Judge Denman: Does that come within the words of the statute?

Mr. Wirin: The statute says that schools result in emotional disturbances and in retarding progress in schools. Now, we want to show affirmatively that attendance at lan-

guage schools results in certain advantages in the home as evidence that the statute is without real foundation, namely, harmony in the home in the ability of the parents to speak to their children and children to speak to their parents in the parents' language.

Judge Denman: How much of this testimony do you want to put in?

Mr. Wirin: Very little. It will take less time than the argument.

Judge Denman: We will allow the question. The objection is overruled.

The Witness: Do you mind repeating it?

Q. Did your attendance in the Chinese language school and your learning the Chinese language have any result, if any, in your relationship with your parents at home?

A. Well, my acquiring the Chinese language has helped me to talk to my parents more freely and, in other words, [fol. 310] to get along with my parents better.

Q. Were there any other advantages which you got from going to a Chinese language school in connection with your present occupation?

A. I believe so.

Q. What are they?

A. In my business and my social contacts and in my personal outlook, I should say, personal philosophy. In my business, if you want to go down to detail, well, I have to read and write the Chinese language in communicating with the shippers in the Orient and in San Francisco; and in my social contacts with the older generation in the Territory, particularly in the City and County of Honolulu, and in my philosophy of life—well, to be honest, to live a peaceful life, I should say.

Q. In connection with your business, do you come in contact with persons of Chinese descent with whom you need to speak Chinese here in Honolulu?

A. Yes, a great deal.

Q. Now, with respect to your children, do you or do you not desire that they learn the Chinese language?

A. Yes.

Q. For what reasons, if any, do you want them to learn the Chinese language? Briefly.

A. To better equip them for their life work in Hawaii, [fol. 311] as well as elsewhere, particularly in China.

Q. Now, with respect to Wing Han Thom, you testified she's in the seventh grade?

A. Correct.

Q. Are you familiar with this law which provides that a child in the seventh grade may not be taught Chinese or any foreign language without passing a certain test?

A. Yes.

Q. Are you or are you not willing to subject your child to take that test in the seventh grade?

A. Most certainly not.

Q. Why not?

A. Well, the commissioner can say my daughter passed the test this year, or this month, and then refuse to pass her the next month. Then that will stop her from going to school continuously and learning the language accordingly.

Q. Is there any other reason why you do not want to subject her to any control by the school authorities over her education in Chinese?

A. For my personal right as a citizen of the United States.

Mr. Wirin: You may cross-examine.

Judge Denman: If you will pardon me a moment. Are the words of Confucius fully translated into English?

The Witness: Partly, your Honor.

[fol. 312] Judge Denman: You have a complete range of the teachings of Confucius?

The Witness: Yes.

Judge Denman: Could you get it without the Chinese language?

The Witness: Yes.

Judge Denman: It could be just as well taught in an English school as in a Chinese school, the teachings of Confucius and the whole line of Chinese classics on their moral side, if you didn't have Chinese?

The Witness: Well, I don't know. I can't answer you, your Honor.

Cross-examination.

By Mr. Flynn:

Q. Mr. Thom, is this a boy or a girl in the seventh grade. Isn't that a girl?

A. Girl.

Q. Your daughter?

A. Yes.

Q. And she's 13 years old, going into the eighth grade?

A. Correct.

Q. Has she had any Chinese language school before?

A. None whatsoever.

Q. None?

[fol. 313] A. None.

Q. So she was in first grade in 1940, is that right?

A. Let's see—about that time——

Q. At that time the language schools were going in full force, weren't they?

A. Yes.

Q. But you didn't bother to send her?

A. Well, I intended. In fact, I registered for the following year, particularly in June, just before the war broke out.

Q. Did she start then in September of '41?

A. Forty-two.

Q. Or did you register——

A. I intended to send her in June, 1942.

Q. At which time she would have finished second grade, is that correct?

A. Correct.

Q. Did you think it would be a good idea to wait those first two grades to send her to Chinese language school?

A. I don't think so, because to acquire the Chinese language you must start them young. In my case I started young.

Q. But in your own daughter's case you were waiting until she finished second grade public school?

A. That's true, because at that time I was also waiting [fol. 314] for my younger daughter to grow up and maybe at that time, well, I had some other engagement. I was too busy then. I can't recall.

Q. The younger daughter would have been then two or three years of age, is that right?

A. No, older than that; in '42 she'll be about four or five.

Q. She's eight years old now?

A. She will be four or five.

Q. She's eight years old now, is that correct?

A. Yes, going on nine, eight or nine.

Q. Well, then, in June of '42 she was three?

A. Well, maybe it's on account of some other reason.

Q. Some other reason that you didn't send your older girl?

A. When she was in the first grade.

Q. You apparently believe, then, that she could start to learn her Chinese language just as well after the second grade as she could in the first grade?

A. I presume it is so.

Q. Will she start to learn it just as well now at the age of thirteen?

A. No.

Q. You don't think so?

A. No, she'll feel ashamed to be in the seventh or eighth [fol. 315] grade in the English school and then in the first grade in the Chinese school.

Q. But would you want her to go?

A. Well, I hope she'll consent to go.

Q. And she'll have to start in the first grade, wouldn't she?

A. Possibly, most probably.

Q. Does she know any Chinese language now?

A. Very little.

Q. Very little. Then wouldn't she have to start in the first grade?

A. I presume it is so.

Q. Now, you have a daughter—that's a daughter again, the eight-year old child?

A. Yes.

Q. She's going to the fourth grade?

A. Going to the fourth, correct.

Q. She'll have to start in the first grade of Chinese school, too, wouldn't she?

A. Yes.

Q. Will she be embarrassed also?

A. Well, she's eight. The difference between eight and six is very little. It wouldn't be so bad then.

Q. But for your older girl there will be some embarrassment, some embarrassing differences?

[fol. 316] A. Correct.

Q. Are your two older girls passing all their regular school studies so far?

A. Yes.

Q. Including their English?

A. Yes.

Q. And the tests that they had in English so far they have passed, then?

A. Correct.

Q. Now, you have stated that you don't want your older daughter, or the other daughter, subjected to any other tests by the Department of Public Instruction?

A. That's true.

Q. Do you have any objection whatever to the tests these girls had been taking so far?

Mr. Wirin: That's objected to on the ground that it's assuming something in evidence which is not. There is no evidence as to what tests, if any, these girls had been given. He has testified generally that he does not want to submit his children to any test as a condition of their studying.

Judge Denman: He stated his reason for it, that it would be a discontinuing thing. A child is a little while in school and given a test, and dropped below, and in again and out again.

[fol. 317] Mr. Wirin: He gave an additional reason, that generally as a citizen he doesn't feel that his children should be subjected to any test as a condition of learning the Chinese.

Mr. Flynn: I think in the next couple of questions, your Honor, all this will prove very pertinent.

Judge Denman: All right. Proceed.

Mr. Wirin: I am objecting to the particular question on the ground that it is assuming something in evidence that is not in evidence, namely, that any particular test is being given or has been given to his children. No such evidence is in as yet in the case.

Judge Denman: You have no objection to making him your witness, have you?

Mr. Flynn: So far I have. I'd like to postpone that.

Mr. Wirin: Moreover counsel has admitted that at the present time at least no tests are given. But the statute is so short-cutted that if a child passes English that that is considered sufficient. So any question about tests certainly is assuming something in evidence.

Judge Denman: What part of the direct examination is this cross relevant to?

Mr. Flynn: He stated on direct examination, your Honor, and he does that not want his daughter subjected to these particular tests. My question so far is, have your children passed any tests that they have been given? Now, the [fol. 318] assumption of fact is an extremely minor one. I am going to state, as I have stated in the argument, that

the tests to be required by our Department of Public Instruction are the existing tests, and that the children need have only passing grades in them. And that's already incorporated in the answer we have filed before and was again incorporated in the amended answer.

Judge McCormick: May I have the last question?

(The reporter read the last question?)

Judge McCormick: The objection made is that there has been no showing that there has been any test made.

Mr. Flynn: It does call for a small assumption, but I think we can take judicial notice that in the course of grade schools there will be tests in English.

Judge McCormick: Do you press the objection, Mr. Wirin?

Mr. Wirin: Yes, I do, your Honor. But we are talking about a statute. We are challenging a statute, and the statute talks about tests in composition and English. Now, I have no objection——

Judge Denman: Can't we take judicial notice of the fact that a business school requires tests. The statute describes them. It's been subject to them.

Mr. Wirin: The matter is of some consequence, for we are rather insistent that the language of the statute be considered, for it is the language of the statute which we [fol. 319] are attacking. Now, there may be all kinds of tests in all schools, but this statute talks about a particular kind of a test, and it recitese that the child shall have passed the fourth grade of public school or its equivalent and shall pass from time to time in each succeeding grade a standard test, not any kind of a test, a standard test in English composition and reading conducted by or under the supervision, under the direction of the Department of Public Instruction, attaining a score not lower than normal for his grade. Now, if tests under this statute are being conducted, that is a matter for evidence to be introduced by the Defendants. It is something certainly he wouldn't know anything about. Moreover, there is a more serious vice in this questioning. Counsel is somehow or other assuming that any other test which is given complies with the requirement of the statute, which we do not concede.

Judge Denman: The direct examination concerning the party's attitude toward complying with a statute, this statute, your question, as I understand it, is addressed to

something other than that, the tests hitherto applied. And, as we see it, the question is not proper cross-examination.

Mr. Flynn: As I say, your Honor, it does presuppose our next question.

Judge Denman: Withdraw this one and put the next one.

Mr. Flynn: That's quite agreeable.

[fol. 320] Q. Mr. Thom, do you happen to know whether your daughters have had English tests in the course of their schooling so far?

A. Yes.

Mr. Wirin: That's objected to as immaterial. May I say to your Honor that I asked this witness purely formal questions to lay a basis, and we ought to make a showing that a plaintiff, for reasons good or otherwise, doesn't want his children to comply with a certain provision of the statute. That's all.

Mr. Flynn: That goes directly to the heart of our statute, your Honor. We say that it is not burdensome or difficult or anything that a normal average citizen would have any difficulty with.

Judge Denman: I know, but there is no evidence here that the tests that have been applied to this child in the past have any relevancy to the test that this party is testing against in the future under this Act. Now, you may be able to establish later a foundation by which you will recall this man back and ask him some questions.

Mr. Flynn: I am trying to avoid it if I can. May I try to put the question this way and see if it is agreeable both to counsel and to the Court?

Q. Mr. Thom, assuming that the only tests to be put to your children are identical both in degree and type to [fol. 321] tests they have had thus far, and that there will not be any additional tests other than those now existing in their regular school work, will you then have any objection to this phase of the law?

Mr. Wirin: Just a minute. We object to that as speculative and improper cross-examination. We are challenging a particular statute and provision in that statute.

Judge McCormick: In there anything that would indicate that the standard tests specified in the statute have already been promulgated so that they were definitely——

Mr. Flynn (Interposing): No. One of our difficulties is an interpretation of what that section requires. And I think I am entitled to cross-examine him on the basis of what we believe to be the proper interpretation of the statute.

Judge Denman: Well, then, state that to us. What is your contention with regard to that?

Mr. Flynn: Our contention with regard to Section 1873 of the statute being challenged is that a standard test in English composition and reading, conducted by or under the direction of the Department of Public Instruction from time to time, has reference only to the existing routine in our schools, which includes certain tests, and can be known as standard tests in English reading and composition, and that there will not be additional tests for children who are attending the language schools, but that they will be required [fol. 322] only to obtain passing grades in the tests now being given and in the future to be given.

Judge McCormick: Where is the justification in the law for that argument?

Mr. Flynn: Well, the reading of the law itself; it allows it, your Honor.

Judge McCormick: Well, the law says "standard tests". Now, that leaves it to the judgment, I take it, of the body that is giving the test.

Mr. Flynn: Yes, there are certain accepted standard tests. I believe they would be accepted by the majority of the state boards of education and city departments of public instruction throughout the country. There are some put out by certain educational association which are given here in the Territory. There are several organizations throughout the country that do that.

Judge McCormick: But aren't those variable to meet changed exigencies and conditions?

Mr. Flynn: And conditions throughout the country as to local dialect problems or things like that, I don't think so.

Judge McCormick: Pedagogical methods, etc.?

Mr. Flynn: Undoubtedly there will be some disagreement, but on the whole the term "standard test" allows our Department of Public Instruction to consider the ones, the various ones throughout the education associations in the [fol. 323] country and to accept the ones they believe to be best adapted to the needs here, or very likely they will accept one that is substantially equal to all the others. There

is quite a bit of accord or agreement throughout the public schools in the country, at least concerning English tests.

Judge Metzger: Wouldn't it depend a great deal on what these tests were as to the feeling of the members of the Board of Public Instruction at that particular time, whether they looked favorably or unfavorably upon foreign language schools?

Mr. Flynn: Well, that presupposes an applied variation of tests.

Judge Metzger: That should hold it down to any sort of test that would continue to be a standard test.

Mr. Flynn: No, I don't believe so.

Judge McCormick: Pardon me. I want to ask Mr. Wirin, do you agree that there are recognized standardized tests with reference to the subject matter of the inquiry?

Mr. Wirin: No, I do not, your Honor. On the contrary, I take the view that the statute is vague because of the failure. I objected to a lay witness being asked really a rather technical question. I have no objection to him being asked pertaining to the language of the statute. That's what we are challenging. And he has already testified that he does not want to submit his children to the kind of test which in general is defined in the statute.

[fol. 324] Mr. Flynn: That's what he understands the statute to define. Now, we are disputing that and asking him if the same answer will be given where the test is clearly a far more unimportant——

Judge Denman (Interposing): What is the value of the test if it is changed from time to time? The Act contemplates shifting tests. As to the standard of three years ago or four years ago, wouldn't you have to first prove what the standard then was, and whether it has been changed or not?

Mr. Flynn: No, I don't think so, your Honor. That presupposes that our Department of Public Instruction—which is almost what the witness testified—that our Department can arbitrarily put the test up so high that all the children will be knocked out of language schools.

Judge Denman: No, but "from time to time," as are the words of the statute, there shall be the test which is so determined and designated by the Department of Public Instruction, "from time to time" such tests as are generally recognized by educators.

Mr. Flynn: Yes.

Judge Denman: Well, now, here is a board that says this test is generally recognized by educators.

Mr. Flynn: Yes.

Judge Denman: You have another board that says this test is generally recognized by educators. And then they [fol. 325] have another board that says something in between those too. And just what would this gentleman know about that?

Mr. Flynn: I'm not asking him if he knows about that. That's the specific point. What I am asking him is in effect if the only tests to be given are the ones now being given. At the present time our Department has, I am sure, many so-called standard tests which are probably a good average of those given all around the country. And I think, too, that those tests all around the country will average fairly evenly for the fourth grade, or for the seventh grade.

Judge Denman: It's nothing that we can take judicial notice of. It's your contention, isn't it, that these tests are what you have just described them? I believe I would have very great difficulty in determining what they were from the description.

Mr. Flynn: Yes. It's in the nature of a dilemma. I want to establish that our Department of Public Instruction's intention concerning the enforcement of this statute—and there will be testimony to that effect—is that the standard tests referred to are the existing tests. If next year they are changed for the sixth grade throughout the country, then ours will probably be revised to correspond with it. But substantially for many years they had been the same. I am quite sure that the sixth grade English test now is very close to that given 25 years ago. It is the standard type [fol. 326] of test, and there is no possibility of our department enacting or requiring certain difficult types of English or reading, composition examinations for the purpose of preventing the child from continuing the studies, or anything of that sort. And that's why we have tried to emphasize that he shall have passing marks for his grade. We use the term "normal" for his grade. By "normal" there we mean passing. We don't mean that he has to be the exact 50 percent average, neither better than most nor poorer than most pupils.

Mr. Wirin: Your Honor, with respect to counsel's present line of inquiry, I am willing to stipulate to something which

may save pursuing the line of inquiry. As counsel for this plaintiff, we are willing to stipulate that it is his position that he does not desire nor intends to submit his children, his children above the fourth grade and seventh grade, to any test of any kind, formal or informal, no matter what it may be, as a condition of having the right to go to a language school. Now, that, it seems to me, would dispose of the purpose of my inquiry of him, something to show that he comes within the statute and challenges a portion of the statute, which we are challenging.

Judge Denman: Does he challenge as a person having an interest in his offspring?

Mr. Wirin: Who does not want to submit his children to that kind of direction or supervision by the state for the [fol. 327] private education of his children, by the Territory. In other words, he is in the same position as the Jehovah's Witnesses, though perhaps he might not agree, Jehovah's Witnesses who do not want to apply for a permit as a condition of distributing literature or delivering a sermon, because he will not recognize the authority of anyone to supervise or control his expression of opinion even to that narrow extent. And that's his position here.

Mr. Flynn: And, if your Honor please, I want to minimize almost to extinction any objection he will have on that ground, if he ascertains or is so advised that his children will have no tests other than those being given now.

Mr. Wirin: I am stipulating for him that even as to those tests he is unwilling to have his children comply.

Judge Denman: I think that answers your contention. The objection is sustained. The stipulation answers your contention.

Mr. Flynn: Well, it gives me some ground on further questions on the same line, which I don't like to waste time on. I would like just to test his credibility of that statement. I would like to ask this witness if he has any objection to the existing tests being given in the grade schools.

Mr. Wirin: We are going to object to that as something beyond his knowledge and as immaterial.

[fol. 328] Judge Denman: Objection sustained.

By Mr. Flynn:

Q. Mr. Thom, you attended Chinese language school until the sixth grade, is that correct?

A. Yes. Well, not until the sixth grade; until I graduated.

Q. Well, you mentioned sixth grade, or you said six years rather.

A. Six years.

Q. And at what grade were you in public school when you started language school?

A. I was in about the second, about the second grade, if I recall.

Q. About the second grade? And you finished shortly before you completed the eighth grade of public school, is that correct?

A. Just about the same time.

Q. Do I understand you to say you graduated from language school at the end of six years?

A. Yes.

Q. In those days there were just the elementary grades then?

A. Only.

Q. Only the elementary grades? It didn't go on to the high school?

[fol. 329] A. No.

Q. There weren't any?

Judge Denman: Is there a Chinese language high school?

The Witness: Yes.

Judge Denman: I mean, was there?

Mr. Flynn: In more recent years, from what the witness says.

Q. Now, before you entered Chinese language school, you had a knowledge of speaking and understanding Chinese, did you not?

A. A little.

Q. A little? But you had lived at home with your parents?

A. Yes.

Q. Who didn't speak any English?

A. Yes, I spoke—yes, they did speak English.

Q. They did speak some English?

A. Not to them but to my brothers and to my friends.

Q. You did yourself?

A. Correct.

Q. But I mean your parents did not speak any English, is that correct?

A. Not at all.

Q. So you did learn sufficient Chinese——

A. To say Yes or No, to learn the different names of [fol. 330] different articles.

Q. You had just a very elementary communication with your parents, then, until you went to Chinese school?

A. Well, I should say yes.

Q. And you were approximately seven years old when you had your Chinese school? You were in the second grade?

A. Seven or eight.

Q. Seven or eight years old? Now, you say that you want your oldest daughter to learn Chinese for her own future use in China?

A. Either in China or in Hawaii, wherever she chooses to go.

Q. And you hope that she will go to Chinese school now when you ask her to?

A. Correct.

Q. But she has to go to first grade; she doesn't know any——

A. That she will have to adjust herself.

Q. Now, with regard to your eight-year old daughter, if it were to be shown to you that after she started Chinese school she lagged behind in her English or regular school, would you still want her to continue with Chinese school?

A. I believe so.

Q. Wouldn't it be more important to you that your children do well in regular or public school?

[fol. 331] Mr. Wirin: Object to it as argumentative.

Judge Denman: Objection sustained.

Mr. Flynn: I have no further questions.

Redirect examination.

By Mr. Wirin:

Q. Do you know whether or not a Chinese language school, Chinese language schools were closed by the military authorities shortly after Pearl Harbor when there was martial law here?

A. It was closed right after the war.

Q. And did they continue to remain closed until the end of martial law in the Islands?

A. They remained closed until today.

Q. And they are closed at the present time?

A. Correct.

Q. By virtue, because of this law?

A. Yes.

Q. And therefore there will be a large number of children who will have to start in the first grade, irrespective of their age, the first grade in the Chinese schools, when the schools reopen, isn't that right?

A. Most probably so, most probably so.

Q. Now, there are one or two matters I should have asked you about before. In the event there are no Chinese language schools that specialize in teaching Chinese language [fol. 332] allowed, do you or do you not intend to teach your children Chinese at home if you can't get them an education in Chinese any other way?

A. I plan to do so at home.

Q. You intend to teach them regularly Chinese, I mean?

A. What do you mean by "regular"?

Q. I mean regularly.

A. Every day or once a week?

Q. Once a week? And you expect two of them at the same time?

Judge Denman: He asked a question: Every day or once a week. Which were you asking?

Q. Well, how regularly do you intend to teach them?

A. Once or twice a week.

Q. And do you intend to teach the two of them at the same time?

A. Yes.

Mr. Wirin: That concludes my examination.

Recross-examination.

By Mr. Flynn:

Q. Mr. Thom, you state that all the language schools have been closed to the present time?

A. Yes, until recently.

Q. Until recently?

A. All the language schools, as far as I know. Indivi- [fol. 333] duals, I don't know.

Q. But the schools?

A. Schools.

Q. Right now there are none?

A. None in operation.

Q. To your knowledge?
A. To my knowledge, correct.
Q. Have you looked at Mun Lam school lately?
A. Yes.
Q. And that is not operating?
A. Not operating, at least by school authorities.
Q. Is it operating at all?
A. Well, I understand that part of the building is rented out to some individual who teaches language school.
Q. Who teaches Chinese language?
A. Chinese language.
Q. Now, you intend to start teaching your children Chinese if they can't go to school?
A. If they can't go to school.
Q. You have not tried to so far?
A. I have tried in several occasions, yes, attempted to do so.
Q. But you didn't continue with it?
A. I didn't continue, no.
Q. Why not?
[fol. 334] A. Well, I was in the hope that the Chinese school will soon be opened up.
Q. But you did not think that you were violating the law when you attempted to before, did you?
A. Well, I didn't know better then.
Q. You think now you might be violating the law if you did?

Mr. Wirin: Objected to, that it's immaterial what he thinks of it.
Judge Denman: Objection sustained.
Mr. Flynn: No further questions.
Mr. Wirin: That's all.

(Witness excused.)

Mr. Wirin: I have another witness, your Honor.

Wilfred Chong, a witness in behalf of the Plaintiffs, being duly sworn, testified as follows:

Direct examination:

Mr. Wirin: I may say to your Honors, in general this witness' testimony will be somewhat similar to the former

witness. In view of the experience that counsel have just had with the Court, I think this witness' testimony will be much briefer. So may I proceed?

Judge Denman: You will stipulate that it will be the same?

Mr. Flynn: Well, I think there should be brief testimony, [fol. 335] your Honor. I will try to hold any objections to try to get rid of it.

Mr. Wirin: I may say to your Honor that my main reason for calling these witnesses is because counsel wanted the right to cross-examination, and we acted as an accommodation to counsel. So I will be very brief. Counsel is going to stipulate with us as to a good deal of the facts in the case, which will save a good deal of time ultimately.

My Mr. Wirin:

Q. Your name is Wilfred Chong?
A. Yes.
Q. Where do you live?
A. I live at Honolu'u, T. H.
Q. Where were you born?
A. I was born in Honolulu, T. H.
Q. And are you of Chinese descent?
A. Yes, I am of Chinese ancestry.
Q. Ancestry. Did you attend a Chinese language school in Hawaii?
A. Yes, I attended and completed the Chinese language school in 1927.
Q. And what education have you had in other than a language school?
A. I graduated the high, St. Louis College, which is a high school, in 1930. And following the high school eduation [fol. 336] I went to the University of Hawaii and finished in 1934, graduating from the University of Hawaii.
Q. Do you have any children?
A. Yes, I have.
Q. Give us their names and their ages?
A. I have four at the present time and three of them are of the school age. They are all daughters. The first daughter is Priscilla Chong; the next daughter, Patricia Chong; and the next one is Pamalia Chong. All begin with a "P" and end with an "A". And the last daughter is Paulette Chong.

Q. All right. What are their ages?

A. The oldest daughter, 13; next is 9; and number three is five; and the youngest, just an infant, a month old.

Q. Now, in what grade is Priscilla, the 13-year old daughter?

A. Priscilla is going to the seventh grade.

Q. And Patsy is in what grade?

A. I call her Pat, Patricia. Pat is going to the fourth grade.

Q. Now, do you want your children to study Chinese?

A. Yes, I want both of them to learn the Chinese as I have gone through it myself.

Q. Are you willing or do you desire that your oldest daughter, who is 13 and attending sixth grade, be required [fol. 337] to take a standard test in English and composition before she is permitted to go to a Chinese school?

A. I personally would object to the test.

Q. For what reason?

A. I see no reason why a test should be given if they are studying Chinese language, because it does not relate to the subject. And secondly, under the Constitution, I don't see why a restraint should be placed on the child to take a test when they want to attend Chinese language school.

Q. Now, in connection with your own attendance at Chinese language school, how many years did you attend the Chinese language school?

A. I finished the school and at that time it was eight years to complete it. I went to China for a year at the time of the First World War, and when I came back I start in the Chinese language school and right on through until I completed in 1927.

Q. What effect, if any, did your attendance at a Chinese language school have upon your relationship in your home to your parents?

A. In my study of the Chinese language schools, it enabled me to speak more fluently and express myself much better to the parents than if I had not the Chinese language school education.

Q. Were there any other results in connection with your [fol. 338] relationship to your parents resulting from your learning Chinese in the Chinese language school?

A. Well, oftentimes we have to talk to our parents in quite lengthy discussions, and the ability to express ourselves in Chinese helps tremendously in creating better

parents and son relationship and better harmony in the family.

Q. What about a respect for your parents? Do you feel there is any relationship between respect——

A. Yes.

Mr. Flynn: I am going to object to that, your Honor. I don't think that is anything concerning the statute.

Judge Denman: The solution went back to the language of the Supreme Court, that it has to do with just that relationship, the parent and child, which is one of the things under our Anglo-Saxon system that men are supposed to be freer. I should think, with the view expressed by the Supreme Court, that it would be competent for a man to tell us what is perfectly obvious, that you have disruption in the family when you have a parent speaking one language and a child speaking another. I mean, there can't be any question about it. The relationship is going to be better if two minds, if two people talk in one area of language. I understand you are not contesting that?

Mr. Flynn: I beg your pardon?

Judge Denman: You are not contesting it?

[fol. 339] Mr. Flynn: No.

Judge Denman: So it is understood that the Government will stipulate that so far as the relationship between children and parents is concerned, that it is a great advantage for a child to be taught fluency in the language in which the parents are going to discipline him and educate him?

Mr. Flynn: Yes.

Mr. Wirin: Very well. We will accept that stipulation. Let me go a step further.

By Mr. Wirin:

Q. What result, if any, so far as your general attitude towards life came from your studying, from your studies in the Chinese language school?

A. Why, in the study at Chinese language school we learn, in the time I spent, a great deal of the proverbs in Chinese, the philosophy of life, and the different teachings of more or less the ethics and the study of the Manchus and Confucius. All those studies in the classics and the different subjects give us a very, a better outlook on life, a fuller appreciation of how to face hardships in life. I feel that

I personally feel that I am very glad that I went to the Chinese language school and spent those eight years.

Judge Denman: Have you a religion?

The Witness: I went to a Catholic school, but I have not [fol. 340] been baptized.

Judge Denman: You went to a Catholic school?

The Witness: St. Louis is a Roman Catholic School. I have spent 12 years there.

Judge Denman: Are your parents of Chinese religion?.

The Witness: Yes, they are Chinese religion. My daughters are Episcopalian.

By Mr. Wirin:

Q. Now, in the event no language schools that specialize in teaching Chinese language are permitted, do you or do you not then intend to teach your children Chinese regularly?

A. Will you ask the question again?

Q. Yes. Suppose you can't send your children to a language school because for some reason the language schools are not allowed, that is, schools that specialize in teaching Chinese language, do you or do you not desire to teach the Chinese language to your own children at home regularly?

A. Yes. I intend to teach them Chinese language. But I feel that the language school would do a much better job than I would do it myself.

Mr. Wirin: You may cross-examine.

Cross-examination.

By Mr. Flynn:

Q. Mr. Chong, you have stated that in the Chinese language schools you learned many things concerning philoso- [fol. 341] phy, morals, ethics. Was that true in the grade schools as soon as you start in the Chinese school? I mean in the primary grade level of the Chinese schools.

A. I went to St. Louis College and we spent a great deal of the study in religion. But as far as learning proverbs and philosophy, I feel that I acquired more of that in the Chinese language school than in my English schools.

Q. Well, I was asking you only whether the proverbs and philosophies and ethics were taught to you in the first grade,

the early grades of Chinese language school. Did you start right out with it?

A. Not in the first few grades. But after a few years you start learning the stories. For instance, now, the instructor would relate a Chinese story to you in the Chinese language school. The instructor tells lots of stories to the children. And all the stories are very beneficial to the students, benefit the students very much, because it deals with some moral of life or certain proverbs. And that helps to put in the mind of the pupils, the children, to respect the parents. For instance, they would give a story about respecting parents, a story of that sort.

Q. Now, when you were attending Chinese language school, did you find the method of your teachers there to be very much different from that of your teachers in regular school?

A. The teaching method is not very much different [fol. 342] The only difference I could see, as far as I am concerned, is that the language is conducted in Chinese. For instance, now, if you were to learn a reader in an English school, well, the instructor would explain the meaning to you. We would *the* the same thing in the Chinese language school. The instructor may be teaching you the first reader or second reader. He would explain the different sentences to you and show how the sentences are composed, how to write the characters. You take in your English school, they teach you how to spell it, how to get the correct pronunciation and teach you the meanings of the larger vocabulary of words.

Q. Was there any difference in the discipline exerted in the Chinese language schools as distinguished from the other schools you attended?

A. The Chinese discipline is very strict.

Q. Very strict?

A. Very strict. And not strict to the extent that is, I may say, unreasonable. It is strict in the sense that the relationship between the instructor and student respect should be maintained.

Q. And that is strictly enforced?

A. I would say it is enforced to such an extent as long as that respect is there, they would enforce it.

Q. Now, while you were attending language school, did you have much home work in your language school work?

[fol. 343] A. Yes, I have home work from both schools. In fact, I went to a private school, so we have a great deal more home work than now the public schools have. And we have home work in the Chinese language school also.

Q. Did you ever find the home work in your language school to interfere with the home work in your regular school?

A. No, I have time, always have time to take care of my Chinese lessons, and in addition to finishing all my home work in the private school, which I have plenty——

Q. Well, how many hours a day in the regular school day did you go to language school?

A. Well, the language school starts at three. I get up from St. Louis College at 2:30. From 2:30 to 3:00 we play around in the playground. We have a playground in the Chinese language school, and we have regular sports, similar to your American school here. And we start in at 3:00. We usually have around two sessions, I mean two classes, two to three classes, and in between we have our recesses. We are out around five o'clock in those days.

Q. So you were going to school all the time from eight o'clock to about five o'clock?

A. Yes. We start in St. Louis College around, at 8:30.

Q. To?

A. To keep me occupied and keep me out of mischief [fol. 344] in the afternoon.

Q. And in the evening all your time was taken up with home work for both schools?

A. Yes, I do a few hours of my home work and I'm completed.

Q. And all that emphasis on classroom and home work didn't interfere with either of your schools?

A. I find no interference because I was able to make good grades in all, through high school, in the St. Louis College. In fact, I ran around from the first to the sixth all the time in all my years in St. Louis College.

Q. And at the same time you were going to the Chinese language school?

A. And at the same time going to the Chinese language.

Q. Was that true of many of your friends who were going to both schools?

A. Yes, I would say that most of the higher ranking students in the high school are also good students in the

Chinese school. They rank very high in the Chinese language school.

Q. Well, there were many——

Judge Denman: Pardon me. Is it the contention of the Government that a fellow adds efficiency to his general education, business efficiency in future life, through knowledge of Chinese? If he does, that is so, of course, of his [fol. 345] knowledge of English. Is it the purpose of the statute to lift the quality of English even at the expense of a greater rounded education and greater chance to get on in life afterwards?

Mr. Flynn: No, our contention, your Honor, is that under this law the quality of the English will be lifted and at the same time the opportunity for acquiring Chinese will be at least as good as before, if not better; because we will have several expert witnesses who will testify that the acquisition of the other language can be better accomplished after delaying the first four grades in grade school to start it.

Judge Denman: All my young friends learned French between five or eight and ten; and it is better to learn it after ten, is that this thesis?

Mr. Flynn: Yes, your Honor. It is contrary to what was taught 25 years ago or 50 years ago, but the majority of educators will contend that. And even in the adult years the foreign language can be started.

Mr. Wirin: Your Honor, may I say what counsel is saying runs counter to what Justice McReynolds said in the Supreme Court, that the court will take judicial notice that the acquirement of proper efficiency in languages was greater in the early formative years.

Mr. Flynn: That's very true, and we dispute what Justice [fol. 346] McReynolds said and say that it was only a dictum from him without any effect upon the judgment in the case rendered by the court.

Mr. Wirin: I think the burden is upon the defendant in that effect.

Mr. Flynn: We hope to establish that, your Honor.

By Mr. Flynn:

Q. Now, Mr. Chong, you stated that you would like to start teaching your children Chinese, is that correct? You haven't done so so far?

A. I teach them now and then, because it is very difficult for a father to teach his own children, and any subject for that matter. If I went to my daughter, to learn other subjects which I learned in English—for instance, I want to teach them typing and shorthand, commercial subjects, but it is so difficult for a father to teach their own children. And that place belongs to a regular institution, language schools that perform the job. I would like to teach them if I have the time and spare moments to do.

Q. Now, your older daughter, Priscilla, did she ever attend language school at all?

A. She has not started yet. I am waiting for the school to reopen and put her in the first grade or second, whatever it is.

Q. She will have to start in the first or second?

[fol. 347] A. I presume she will have to start in the first, because they have no previous knowledge of Chinese.

Q. Well, she was in the first grade in 1940, is that right?

A. She's in the seventh now. Yes, around first grade.

Q. And at that time you didn't bother to send her to language school?

A. No, I didn't start at that time, because she was taking music in her very early years. She was occupying her afternoons to taking music and I planned to send her the moment she acquired a little basic knowledge of music and to start her with the Chinese language school.

Q. Now, your next girl, Patricia, nine years old and going to the fourth grade?

A. Going to the fourth.

Q. Is there any necessity from your standpoint that she start language school this year or wait until next year?

A. I would send her soon as the school reopens, soon as the Chinese language school reopens I would send her.

Q. Do you have any opinion as to whether her Chinese language can be learned better if she starts this year than if she waits one more year?

A. The sooner you start, the better, because the sooner you start the sooner you would graduate from Chinese language school, and you could pay your full attention to your [fol. 348] college years when you reach college; you could devote all your time to studies for the four years in college.

Q. Now, supposing your nine-year old girl were to start language school this year, her teacher in English school were to tell you that her English was suffering, that she

was lagging behind in it, would you be willing to withdraw her from language school until her English improved?

A. Well, at first I would find out what the causes of that lagging were. A lot of times the children are maybe getting to a certain age, they get with some neighborhood friends and they play around too much, or maybe I have bought them a new bicycle and they have been using the new bicycle in running around, and have neglected their studies. I have to determine the cause why they have neglected their studies in the English schools.

Q. Supposing you were satisfied from expert testimony that the cause was the additional study of Chinese?

A. I would get after her and tell her to spend a little more time in both and let her continue and gradually will adjust itself.

Mr. Flynn: No further questions, your Honor.

Mr. Wirin: No questions. That's all.

(Witness excused.)

Judge Denman: The Court will recess until two o'clock.

(The Court recessed at 12 o'clock, noon.)

[fol. 349] Afternoon Session

(The trial resumed at 2:00 o'clock, p.m.)

Judge Denman: Proceed.

Mr. Wirin: Before we call another witness, may I just take a moment to address myself pertaining to a judgment? This is on the statutes in the Meyer and Bartels cases. I got the impression that Judge McCormick got the impression that the statutes in those cases expressly mentioned German and were intended exclusively against Germans. As I understand the fact, and I have just discussed the matter with Mr. Flynn, the statutes on their face said nothing about German. The statutes on their face undertook to prescribe the teaching of all languages other than English. And in that respect it is quite comparable to this statute. It is true that the legislative history of those statutes, and indeed of the statutes of some 21 states—which were all modelled after the Nebraska statute, and none of which mentioned German by name—it is true that the legislative history of all of those statutes discloses that the statutes

were aimed at the German language, and the particular litigants on criminal prosecutions were persons who taught the German language. But I want to clarify that.

Judge Denman: Well, there is in the dissent of Holmes a reference to the Polish groups.

Mr. Wirin: Yes.

Judge Denman: That is a matter which in the course of [fol. 350] argument has been admitted or discussed in the Supreme Court.

Mr. Wirin: Yes, I think it is clear, your Honor, that those statutes were intended against the German because the justification for them was that they were necessary in the interests of Americanism and patriotism, and then the proscribed group were those that spoke German. So I think it was conceded generally that the statute was aimed against Germans. But the point is, that while the statutes were aimed against Germans, they did not recite German, and yet the Court looked to the real purpose of the statute and held those statutes un-Constitutional. So similarly here.

I think probably that the purpose of this statute was in connection with the Japanese language school, and pretty much solely in connection with those groups. But in order to avoid the Constitutional difficulties, as Mr. Flynn stated, the statute was couched in very broad terms so that it included the Chinese who are incidental victims of the statute and would also include all other languages of every kind and description, including the Hawaiian. I was merely trying to clarify the text, at least, of the statute in those cases.

Mr. Flynn: I wouldn't like the Court to give too much consideration to that suggestion on the part of counsel that it is aimed exclusively at Japanese and Chinese language schools. I think the law is entitled to much broader consideration and that where it specifically recites Oriental [fol. 351] languages as being greatly in contrast with the English, and what our statute is driving at is not directly or even by inference concerning the Japanese language schools or alleged propaganda that they taught but the deficient English resulting from the large segment of our population having taken up the studies of Oriental languages.

With regard to the other cases, I would like to assure the

Court that I intend to reread them very carefully myself and will take them up later in argument.

Mr. Wirin: Would your Honors permit me one more word in that connection? As I recall it, the House reports, at least one of the reports in connection with the instant statute, which reports are attached as exhibits to the defendants' answer, recite that the problems which this statute was designed to deal with essentially involve the Japanese language schools, and then also incidentally the Chinese schools. I think there is some reference to the fact that the Japanese schools were by far the vast majority and the Chinese schools were comparatively small. And as far as the other language schools, they are comparatively nil. I think the phrase "comparatively nil" is the exact quotation from the House reports. Do you know what report that is, Mr. Flynn?

Judge Denman: Do I understand you to say that somewhere in the statute there is a reference to the Oriental languages?

[fol. 352] Mr. Flynn: Yes, your Honor, the declaration of purposes, the very first section of the statute. No, I must take that back. It is not in the statute. It is in the legislative findings referred to by counsel in the reports of the legislative committees.

Judge Denman: Is that in both of the Houses?

Mr. Flynn: I think both Houses.

Judge Denman: That speak of the Oriental languages?

Mr. Flynn: I am sure they do. We have the Senate report, too, in the answer.

Judge McCormick: Exhibit "A".

Mr. Wirin: May I read the pertinent portion? Exhibit "A" reads:

> "The overwhelming majority of the schools which teach foreign languages, therefore, are those which teach the Oriental languages, Japanese, Chinese and Korean, the latter two being very few in number."

And then there is the objection and talk about the Japanese language schools. Before that there is a statement:

> "The number of foreign language schools in the Territory, as defined in the bill, which teach any foreign language other than an Oriental language to students

under senior high school age or under the eleventh grade are practically nil. * * *"

Judge Denman: Well, of course, they must be referring [fol. 353] to schools that have an organization, those within the definition of the statute. It is conceivable that European people, Portuguese, Spanish and others, aren't teaching school in the statuory definition.

Mr. Flynn: Well, that is just about correct, your Honor. But the two reports both show that at one stage of the consideration by the legislative committees the term "foreign language school" was used, and defined to mean any school that teaches a language other than English; whereupon somebody discovered that all of our public and private schools would be foreign language schools under the statute because they teach French, German, Spanish or Japanese in the high schools. So thereafter the wording was changed. So that the statute as now drawn refers only to the teaching of foreign languages and doesn't refer to foreign language schools except in this definition.

Mr. Wirin: May I make another observation in that connection? My impression of the legislative history and purpose is something like this: It is an impression with respect to which I think we will have some evidence, that the real purpose of the legislation in its initial stage at least was in connection with the Japanese language schools. The Court judicially knows that there was similar legislation some years ago. The Court may also judicially note that there was a good deal of feeling or agitation against [fol. 354] the Japanese during the war. This is a war statute. It was enacted in 1943. Well, now, obviously in drafting a statute dealing with language schools any lawyer who is consulted would look at the decisions. He would know about the Farrington case. And, as Mr. Flynn said, the statute was designed to avoid any Constitutional difficulties. Now, in order to do that, what do you do? You don't make it narrow, but you make it as broad as possible so as to defeat any contentions of un-Constitutionality because of the discrimination against a particular group.

Now, our position is that in attempting to make it wide the result is that it is so wide that it encompasses, as Mr. Flynn has said, not only schools but the teaching of foreign languages anywhere, everywhere, by whatever person, and all foreign languages. And it is a typical example where

you attempt to do one thing which is probably illegal and you end up by doing exactly the opposite which is perhaps equally illegal. But that is our position about it, your Honor, and your Honors will have to decide how true that is.

Mr. Char: If your Honor please, we have to produce an interpreter with reference to this witness.

Judge Metzger: Swear the interpreter.

(Y. J. Soto was sworn to interpret Chinese into English and English into Chinese the testimony of Leong Ngut Cho)

Judge Metzger: Did you ever interpret before?

[fol. 355] The Interpreter: Yes, I interpreted in the Police Court.

Leong Ngut Cho, a witness in behalf of the Plaintiffs, being duly sworn, testified as follows through the interpreter:

Direct examination.

By Mr. Char:

Q. What is your name?
A. Leong Cho.
Q. Will you spell it, please?
A. L-e-o-n-g, N-g-u-t, C-h-o.
Q. What is your occupation?
A. I am a teacher.
Q. Chinese school teacher?
A. Yes, I am a Chinese school teacher.
Q. How long have you been a Chinese school teacher?
A. About 22 or 23 years.
Q. Where were you born?
A. I was born on Waipio, Hamakua, Hawaii.
Q. That's the Territory of Hawaii, is that right?
A. Yes.
Q. How old are you?
A. I am sixty years old.
Q. Did you go to China?
A. Yes.
Q. When?
[fol. 356] A. I went back when I was nine years old.
Q. And how long did you stay? How long did you stay in China?

A. I went back when I was nine years old and came back when I was twenty-one years old.

Q. Well, when you were in China did you study Chinese exclusively?

A. Yes.

Q. Did you graduate any high school or grammar school in Chinese?

A. Well, it's—I graduated from a school, Chinese school, but that was during the Ching Dynasty, Manchu Dynasty.

Q. Now, when you came back to Honolulu, when you were 21 years of age, did you then teach Chinese?

A. Yes, I taught after I went to the country to the islands for a while. Then I came back to Honolulu. I taught in Honolulu.

Q. What school?

A. At Chung Shan School.

Q. For how many years?

A. About 22 or 23 years.

Q. Did you study English in the English school?

A. I did not attend any English school.

Q. Can you speak and read the English language?

A. I can't speak very much.

[fol. 357] Q. Do you know the English idiom?

A. I do not understand the English idiom.

Q. Now, you said you teach in the Chung Shan School for the past 23 years, is that right?

A. Yes.

Q. And did you stop teaching when the school closed in 1941?

A. I did not teach after the school was closed.

Q. Did you do any other work during the war years up to the present time?

A. I did not do anything since the school closed.

Q. Where do you live?

A. I live in a house behind the school.

Q. That belongs to the school, is that right?

A. Yes.

Q. You are now ready, willing to go back to your teaching profession should the school resume or open, the foreign language school?

A. Yes.

Q. Have you any other occupation besides teaching foreign language, Chinese language?

A. No, I don't have any other occupation.

Q. Do you know the American principles of democracy?

Judge Denman: Is this relevant?

A. Yes, I do.

[fol. 358] Mr. Char: Well, the idea is to build up his good moral character.

Judge Denman: There is no question about that.

Mr. Flynn: I don't think it is relevant.

Mr. Char: I'll withdraw that question.

Q. Are you one of the plaintiffs in this case?

A. Yes.

Q. Now, in all these years of teaching, these 23 years of teaching in the Chinese language school, did you ever have any complaints from parents of students attending Chinese language school of mental conflict, emotional disturbance?

A. No complaints whatsoever.

Q. Did you yourself notice in these past 23 years in teaching the Chinese language that the students do have sometime or any time mental conflict or emotional instability?

A. No, no, sir. And they seemed to like to attend Chinese school.

Mr. Char: You may cross-examine.

Cross-examination.

By Mr. Flynn:

Q. Mr. Cho, you understand English a little bit?

A. I don't know English much.

Q. You have lived in this country for the last 39 years, is that right?

A. About 35 years.

[fol. 359] Q. And you had also been born here in Hawaii before then, is that right?

A. Yes.

Q. From all those years of living here have you not had some contact with English-speaking people?

A. No, I only had contact with Chinese teachers who do not speak any English.

Q. What grades in the Chinese language school have you taught.

A. Well, I had taught almost all the classes because we took turns in teaching different classes.

Q. Have you then had occasion to teach the first year of Chinese or first grade in the school?

A. Yes, I taught the first grade.

Q. Were there ever any children in the first grade who previously did not know any Chinese?

A. Yes, there was students who don't know Chinese before they enter the first grade.

Q. There were some children?

A. There were some children who don't know Chinese before they enter the first grade.

Q. Were those children able to learn from your teaching when you didn't know a word of English to give them?

A. Well, they don't understand the written language but some of them they understand the spoken language.

[fol. 360] Judge Denman: I think your question was,—I'd like to have it answered,—a child had spoken no Chinese and came to the school, and was this witness able to teach him Chinese under those circumstances?

Mr. Flynn: And without knowing a word of English.

Judge Denman: Well, that's already in the evidence.

Judge Metzger: I wouldn't say he didn't know a word of English.

Mr. Wirin: Would you ask him the question again?

A. Well, it takes a little time but they will understand gradually. At the same time their parents taught them Chinese at home. They are listening a little bit.

Judge Denman: Well, isn't it true that what happened was that some of the Chinese children that spoke English, and other children couldn't speak English, and this professor or teacher here in the complex, in the mixture, finally got the Chinese words over to the non-Chinese speaking children? You had better repeat it for him.

(The reporter read the last question.)

A. Well, they can—those non-spoken Chinese students, well, they seemed to catch up very easily, specially like singing a song, why, they'll catch up in no time even though, they don't understand the language.

Judge Denman: Did you have any white children, European children, in your class?

[fol. 361] Judge Metzger: Haole.

Mr. Wirin: The phrase is "haole", as I understand it.

The Witness: Well, we had sometimes, we had a Japanese or Korean student in the class.

Judge Denman: No, whites.

The Witness: Well, not—we have some part haole, part haoles in the class, one or two part haoles.

Judge Denman: What it that?

Judge Metzger: Part.

Judge Denman: Part Chinese and part white?

The Witness: Part white.

Judge Denman: Did you have any Hawaiians?

The Witness: Well, part Hawaiian.

Judge Denman: Do you speak Hawaiian?

The Witness: I don't understand Hawaiian because I left here when I was small.

Judge Denman: Are you a citizen?

The Witness: Yes.

Mr. Wirin: The Court will take judicial notice that all persons born in the United States are citizens.

Judge Denman: Was he born here?

Mr. Wirin: He was born——

Judge Metzger: Not in the Territory of Hawaii,——

Mr. Char: He was born in Waipio, Hawaii.

Judge Metzger:—not in the time he was born.

[fol. 362] Mr. Char: Well, at the time I was born, before annexation, I was taken in as a citizen.

Judge Metzger: But you were a denizen of the country at that time, and he was in China.

Mr. Flynn: I would like that question answered. I don't know whether the witness answered it or not, whether he is a citizen of the United States.

Judge Denman: He said he is.

Mr. Char: What is your father, a Hawaiian citizen?

The Witness: Yes, he is a citizen.

Mr. Char: Hawaiian citizen?

The Witness: He is an American citizen.

Mr. Char: Your father is an American citizen? Oh, yes, by the time of annexation——

Mr. Wirin: If your Honors please, for the purposes of this lawsuit it doesn't make any difference. Some of the plaintiffs are citizens and also I understand that under the decisions one does not have to be a citizen in order to have the right of custody over children in this country. So it is somewhat immaterial. And an alien has the right to follow an honest occupation the same as a citizen.

Mr. Flynn: I will stipulate to those things, if it is of any matter. I thought it was only interesting in cross-examination to get something more about this witness.

Judge Denman: Are you through?

[fol. 363] Mr. Flynn: I am trying to find one more point, if the Court please.

By Mr. Flynn:

Q. Mr. Cho, do you have an opinion as to whether it would be easier to teach children in the first few grades Chinese where the teacher also has a knowledge of the English language?

A. It doesn't make much difference whether the teacher knows English or not.

Q. Do you have any opinion as to whether it would make any difference to the child?

Mr. Wirin: As to what, difference as to what?

Mr. Flynn: I'd be glad to save time by referring to the previous question. I mean teaching. The child attending school in the very early or first grade of Chinese school, would the child be benefitted or harmed or would it be material if the teacher teaching him had a knowledge of English as well?

Mr. Wirin: I am going to object on the ground that it is highly speculative. I wouldn't object to it, to save time.

Judge Denman: It's pretty obvious to anybody that if I don't speak Chinese in one situation in learning, that that is one situation, and if I do speak Chinese I have another. Of course, there is a difference. It's obvious that there is a difference.

[fol. 364] Mr. Flynn: Well, that's satisfactory to me. I'd like to have it in the record.

Judge Denman: If you want to get down to other things, pedagogical questions, that is an entirely different thing, but there is a difference.

Mr. Flynn: Well, this is in the nature of a pedagogical question.

Judge McCormick: Mr. Flynn, I don't get the material feature of the case. I don't know whether it is obvious or not in a case of this kind, but if you think it is——

Mr. Flynn: I would like to have it answered, although I am satisfied from Judge Denman's ruling that it was obvious.

Judge McCormick: If you are satisfied, all right. May I have that question again?

(The reporter read the last question.)

Mr. Wirin: I wonder if the question couldn't be reframed?

By Mr. Flynn:

Q. Do you have an opinion as to whether it is of any value to the child in the first grade of Chinese language school to have a teacher who understands both the Chinese and English languages?

A. Well, I don't see much difference because if you understand English and you understand Chinese, we teach students the same way.

Mr. Char: That is, they teach exclusively in a class? They [fol. 365] don't teach the English language at all?

By Mr. Flynn:

Q. Well, there are great differences between the English and Chinese languages, is that not so?

Mr. Wirin: We object to that on the ground that this witness has testified he is not familiar with the English language. We put him on for limited purposes. We didn't put him on as an expert. We merely put him on to state what he taught and to show that he is a legitimate party plaintiff.

Mr. Flynn: I think that may be true. I'll withdraw the question. I have no further questions at this time.

Mr. Wirin: That's all.

(Witness excused.)

Pung Chong Lee, a witness in behalf of the Plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Char:

Q. What is your name?
A. Pung Chong Lee.
Q. What is your occupation.
A. P-u-n-g, C-h-o-n-g, L-e-e.
Q. What is your occupation?

A. I am manager-partner of a grocery store, wholesale and retail.

[fol. 366] Q. Did you attend English school?

A. Yes.

Q. Did you graduate from any college?

A. I graduated from the University of Hawaii.

Q. Did you attend language school?

A. Language school.

Q. Did you graduate any language school?

A. Yes, from Chung Shan Language School.

Q. That's one of the plaintiffs in this case?

A. Yes.

Q. Did you attend any war service?

A. Yes, I was in the war.

Q. That is the last war?

A. This second war.

Q. You were a lieutenant?

A. I finished as a captain.

Q. Where were you? At Burma?

A. Yes, Burma and China theatre.

Q. What position did you occupy in the American Army?

A. I have been a liaison officer with the Chinese Army, liaison officer attached to a Chinese Army.

Q. With your knowledge of Chinese, was that useful to you between the American Forces and the Chinese Forces?

A. Certainly, yes.

Mr. Flynn: I want to object to this line of testimony.

[fol. 367] I don't think it has any relevancy to our case.

Judge McCormick: What is the materiality?

Mr. Char: Just to show the effect of his learning the Chinese language and its usefulness, say in the last war, during a certain state.

Mr. Flynn: I am willing to stipulate that the Chinese language is useful in many ways, including uses in the last war.

By Mr. Char:

Q. Well, when you attended the language school at the same time with the English school, did that affect you mentally or emotionally?

A. Well, I can't tell. I am not a psychologist. I can't tell.

Q. Were you consciously aware of that?

A. No.

Mr. Char: That's all.

Mr. Flynn: No questions.

Judge Denman: When you look back at your childhood you have had disturbances as all children have? Sometimes your stomach would hurt and sometimes you received a scolding from your parents?

The Witness: That's right.

Judge Denman: Do you recall any result of studying two languages at the same time which created an emotional [fol. 368] disturbance or depression or emotional pain or discomfort? Do you recall any such thing?

The Witness: No. I have been a pretty healthy boy.

Judge Denman: This is health of mind. Did you have health of mind while you were endeavoring to master two languages at the same time, or did it produce distress? And if it did produce distress, did it produce great distress such as resulted from the loss of a baseball bat or something like that? I understand it did not?

The Witness: No, sir.

Mr. Char: As a matter of fact, you taught for ten years in the Chung Shan Language School as Chinese teacher, is that right?

The Witness: Yes.

Mr. Char: That's all.

Judge Metzger: Were you ever morbid or feel as if you were overworked by carrying on the studies of two languages at the same time?

The Witness: No.

Judge Metzger: Did you have any feeling of resentment towards being required in your early days to go to two separate schools?

The Witness: I didn't have.

Judge Metzger: Well, did you have any feeling to the contrary of that? Was it a thing that you looked forward to [fol. 369] with delight and felt that you were getting ahead of those who didn't do it?

The Witness: Maybe I am not answering your question right, but in fact I like Chinese school pretty well because I have the association with the children. In fact, we have many friends, for instance, who are classmates in Chinese schools.

Judge Denman: Well, came playtime after the white school was through, then came your playtime, then came a

class in the Chinese school, then more playtime, then another class in the Chinese school, then more playtime, is that it, is that the succession?

The Witness: Yes, we have socials.

Judge Denman: You didn't find that that succession, as I understand the testimony, was of any deleterious emotional distress to you?

The Witness: No.

Judge Denman: On the contrary, when you think of the inter-mixture of play between classes and the associations created, did you feel there was a gain or a loss there?

The Witness. A gain.

Judge McCormick: Well, was the student body in the two schools about the same or were they different?

The Witness: Well, some of the students were in the same school. For instance, when I was attending McKinley [fol. 370] High School, the students were attending the Chinese school at the same time with me.

Judge McCormick: Well, was that generally the case, the same students attending both schools?

The Witness: Yes.

Judge McCormick: Well, there wouldn't be any difference there, emotionally or otherwise, as far as the co-mingling and association of the boys and girls together, would there?

The Witness: But, of course, the students were largely of Chinese descent.

Judge McCormick: You say "largely". What percentage of the school population would be Chinese and otherwise?

The Witness: About 99 percent.

Judge Metzger: You are speaking of Chinese school?

The Witness: Yes.

Judge McCormick: Now about the other school, the public school?

The Witness: All races.

Judge McCormick: What percentage of Chinese would be in the student body?

The Witness: I wouldn't know.

Judge McCormick: Well, approximately?

The Witness: I wouldn't——

Judge Denman: More Japanese than Chinese in your school?

The Witness: I attended first public school, grammar [fol. 371] school at Palama, which is a Japanese district and Hawaiian. Then I finished Central Grammar, which

is equal, the race is about equal, equal races, you have whites and Japanese, Hawaiians, and so forth. Then I attended McKinley High School, which the bigger portion of the students were Japanese.

Judge Denman: Then you say you found stimulation in segregating yourself from these others and playing together with those who were in the Chinese schools, in the afternoon, studying and playing together in the afternoon, is that correct?

The Witness: Well, just merely being together you find some creative work. You have games or have socials, you create some sort of activity. We had picnics quite often.

Mr. Flynn: May I ask a few questions, if the Court please?

Cross-examination.

By Mr. Flynn:

Q. Mr. Lee, how old were you when you started Chinese language school?

A. I was born in China and I started when I was about six years old.

Q. You started there in China? Were you in China then?

A. Yes.

Q. How old were you when you came to the United States?

A. Eleven years old.

[fol. 372] Q. Did you know any English at that time?

A. No.

Q. Not a word?

A. Not a word.

Q. You started your English then?

A. Eleven years old, yes.

Q. What grade in school did you start?

A. First.

Q. You had to go into first grade?

A. Yes.

Q. When you were eleven years old?

A. Yes.

Q. And did you manage to skip any grades or did you stay at the same rate as regular public school children have to do?

A. I remember I skipped the fourth grade and the sixth grade.

Judge Metzger: In what school, in English?
The Witness: In English school.

By Mr. Flynn:

Q. So you never knew any English until you were eleven years old?

A. Yes.

Q. Did you have any particular trouble in picking it up after that age?

[fol. 373] A. You mean having trouble picking up English?

Q. Yes.

A. Well, I didn't have a family when I was a child in Hawaii. I lived with my father. So being with my father most of the time, naturally I spoke Chinese more than English. And I am not bragging but I am a fair student. I mean I make pretty good grades in English school. I finished grammar school in six years and I finished four years of high school, and I finished college within three and one-half years.

Q. I would note that your English is probably at least as good now as the vast majority of your friends, isn't it?

A. I guess so.

Q. And yet you didn't start until you were after eleven years of age?

A. Yes.

Q. Now, Mr. Lee, you stated that you liked and enjoyed Chinese school, Chinese language school here in the Territory?

A. Yes.

Q. Well, that was undoubtedly very similar to what you had for the first eleven years of your life, wasn't it?

A. No, the first year, the first eleven years I was in China. The environment is so different.

Q. But isn't the Chinese language school environment here in Hawaii similar to schools in China?

A. No, altogether different, altogether different.

[fol. 374] Q. Just briefly, what is the difference?

A. Now, we attended school from morning to evening, from seven o'clock to about five o'clock in the evening, and we had one tutor with about a hundred students. And we didn't have sports, we didn't have any socials, we didn't have the opportunities as we did have in English school here.

Q. Now, you have stated that you enjoyed Chinese lan-

guage school here. Do you feel that is true of the majority who were in school with you?

A. Now, we often, even now, we have class reunions now and then, and we always talk about old times, and we, like any American boy, we talk about our pranks and good fun.

Q. Were there not many of your friends in school with you at that time who were constantly trying to play hooky from language school?

A. Well, there might be a few, but the majority of them they attended regularly sessions.

Q. You think the majority like language schools?

A. I imagine so.

Mr. Flynn: I don't have any further questions.

Mr. Char: That's all. Thank you.

(Witness excused.)

Mr. Wirin: Call Mr. Reinecke.

JOHN E. REINECKE, a witness in behalf of the Plaintiffs, being duly sworn, testified as follows:

[fol. 375] Direct examination.

By Mr. Wirin:

Q. What is your name, please, Mr. Reinecke, and spell it for the reporter?

A. John E. Reinecke, R-e-i-n-e-c-k-e.

Q. What is your profession, Mr. Reinecke?

A. I am a school teacher in the public high schools.

Q. In the City of Honolulu?

A. In the City of Honolulu.

Q. What public high school?

A. W. R. Farrington High School.

Q. How long have you been a teacher in Hawaii?

A. I have completed sixteen and one-half years.

Q. Teaching in the schools in Hawaii?

A. Teaching in the schools of Hawaii.

Q. What schools have you taught in?

A. I have taught in two intermediate schools on the Island of Hawaii, two on this island, and two of the senior high schools here, and at the University.

Q. The intermediate schools are of what grades?

A. From the seventh to the tenth grade. One of those which I taught ran as far as the tenth. Normally they run to the ninth.

Q. During the course, during the time that you have taught school in Hawaii, have you had occasion generally to observe the students and pupils who attended the school and were in your classes?

[fol. 376] A. I have had, yes.

Q. Approximately how many children went through your classes during the years?

A. I should say between sixteen and eighteen hundred.

Q. Now, have you had any particular interest so far as your professional work is concerned?

A. Yes, I have had.

Q. What is that interest?

A. I have been considerably interested in language problems in Hawaii.

Q. And for how long a period have you been interested in the language problems in Hawaii?

A. I believe it was in 1932 that I began special study of them.

Q. And what has been the nature of your special studies of language problems in Hawaii?

A. First I began studying the structure of the dialect of English spoken here, commonly called "pidgin".

Q. Pidgin English? What is the nature of your study that you made in connection with pidgin English?

A. I think I could answer if I might go on, I would answer more fully.

Q. Do.

A. From that I went on to the historical background of English, of this pidgin English, and of the sociological [fol. 377] problems raised, and in fact to the history and sociology of the whole language situation in Hawaii.

Q. Over how long a period did those studies last?

A. Intensively over a period of three years. I took my masters degree in 1935 and submitted a thesis at that time called "The Language and Dialect in Hawaii," which covered the whole field. Then I continued my studies and in 1937 I presented a dissertation which compared pidgin languages and the dialects spoken throughout the world, from a sociological point of view.

Q. Did you write a doctrinal thesis?

A. I did, yes.

Q. What was that called?

A. It was called "Marginal Languages, A Sociological Survey of the Creole Languages and Trade Jargons." Since that time I have continued to keep abreast of the literature covering the language situation in Hawaii, and in my teaching I have done a good deal of observation of the pidgin English and of the language situation generally.

Q. Are you familiar in a general way with the problem, so-called problem of language schools in Hawaii?

A. I am, yes.

Q. And are you familiar generally with the problem of so-called problem of bilingualism?

A. Yes, I am.

[fol. 378] Q. In Hawaii? Or is it more than bilingualism?

A. It is multi-lingualism in several cases. They speak more than a few languages, if one counts the pidgin English as a separate speech, and I think it must be so counted to some extent; many of the students speak three languages.

Q. Which languages, consisting of what?

A. Well, with many of them their mother tongue is pidgin English, standard English, and whatever their parents' language is, are the other two in that order.

Q. And their parents' language would consist generally of the following—please mention the leading languages in the community?

A. Japanese, Chinese, Filipino, to some extent Spanish,—and they are considerably less—and Korean, and to a considerable less extent Hawaiian and Portuguese.

Judge Denman: Has Portuguese died out here?

The Witness: It has not died out but very few of the students in the schools have more than a smattering of Portuguese words. They can't construct complete sentences in it.

Judge Denman: What about the time of Portguese importation of Portuguese labor?

The Witness: There were two waves of importation. One of them was in the 1880s; another came in the 1910s. But I understand that a large number of the second group moved [fol. 379] on to the mainland.

Judge Denman: So that you have the 1880 group who are in the third generation now, and the language disappeared and only a few of the others?

The Witness: Third and fourth. The children now are third generation or perhaps fourth.

By Mr. Wirin:

Q. Are you familiar particularly with the literature, including authentic studies, in the field of bilingualism and the relation of bilingualism to the mastery of English in the standard schools? Is that question intelligible to you?

A. More or less. By the standard schools you means the public and private schools that teach English?

Q. Well, I meant really just a public school.

A. May I have the question?

(The reporter read the question.)

A. I am familiar with all two——

Mr. Flynn: May I interrupt a minute? The term "standard school" has a special meaning. I think it had better be eliminated.

Mr. Wirin: Suppose I reframe the entire question.

Q. Have there been any studies made?

A. There have been two studies made.

Q. In the field of the relationship of bilingualism to [fol. 380] progress in the mastery of English in the public schools?

A. I will correct that, please. There have been a number of studies made of the relation of bilingualism to mastery of the English language, not necessarily in the schools. The best of those studies have been made on preschool children, as relates to the relationship between attendance of language schools and proficiency in the public schools. I know of only two studies.

Q. What are those studies?

A. There is one by a Doctor Symonds and another by Mr. Schwartz.

Q. Now, let's have the full name of Doctor Symonds, if you have it at hand.

A. I'll give the complete name and title.

Q. Yes.

A. It is Percival M. Symonds, "The Effect of Attendance at Chinese Language Schools on Ability with the English Language," the Journal of Applied Psychology, 8-411-41, December, 1924.

Mr. Flynn: May I have that?

The Witness: It is Percival M. Symonds, "The Effect of Attendance at Chinese Language School on Ability with the English Language," in the Journal of Applied Psychology, Volume 8, pages 411 to 413. I may have the pages wrong on that. But at any rate, it is December, 1924. The study itself is made the preceding year. So that it is now 24 [fol. 381] years old.

Q. What is the subject of that study?

A. It is a comparison of the ability in English and of the all around mental ability of Chinese students in the public schools, some of whom had attended the language schools and others who had not.

Q. Let me ask you, is the study, or do you consider the study an authentic and accredited study upon that subject?

A. I do.

Q. Are there any other studies in that, upon that subject?

A. None that I know of.

Q. I thought I heard you mention Schwartz?

A. Well, none that are of scientific validity.

Q. You consider the study by Mr. Symonds as of scientific validity?

A. I do.

Q. Is the study recognized by experts in the field of sociology and languages as an authentic and scientific study?

A. It seems to be. It is cited by all the students of the problems of the bilingualism in Hawaii and by several educators.

Q. Is there any other study now that is authentic and accredited in addition to the Symonds study?

[fol. 382] A. I don't believe that there is, no. The Schwartz study is somewhat superficial.

Q. Let's have the reference to that?

A. Here it is. Henry Butler Schwartz, "A Study of the Effect of Attendance at Language Schools Upon the Success in McKinley High School." That's found in the Hawaii Educational Review, Volume 14, pages 30 and following, October 1925. And it covers the scholastic achievement of the students at McKinley High School in the years 1923 to '25.

Q. All right. Now, what evidence, if any, is there in the field that you are discussing with respect to the influence

of bilingualism so far as retardation and mastery of English is concerned?

And I may say to the Court that that is a kind of a preliminary question, and I think I shall explain my question if I may, and that is in this question I am trying to draw a distinction between bilingualism as such, namely, where persons in the community speak languages on the one hand, speak two languages on the one hand, and the relationship of bilingualism to language schools. In other words, conceivably this community and many communities are bilingual in effect, even though there are no language schools, no language schools at all. Then there are communities like this community which also has language schools. This question is a preliminary question as to whether there is [fol. 383] any relationship between bilingualism in this community as such and the mastery of English. Then I propose to go further in an effort to ascertain whether or not there is any relationship between the language schools and any effect upon the mastery of English which, as I understand it from my quick effort to know the subject, is an entirely different matter.

Do you have my question in mind?

A. I do. Are you referring to Hawaii?

Q. Hawaii. And all my questions from now on until I indicate are in connection with Hawaii.

A. Yes. So far as Hawaii is concerned, the studies show that bilingualism is a retarding factor in the use of English.

Q. And in what respect and how much?

A. To a considerable extent, and I would have to refer to the studies individually to give the exact findings.

Q. But there is some retardation?

A. There is retardation in various lines, vocabulary structure, etc.

Q. Now, what relationship is there, if any, between the existence of language schools in Hawaii—referring now particularly to the Chinese and Japanese language schools—and any retardation in the mastery of English?

A. I believe that there is little or none.

Q. Well, please explain your answer to the two questions [fol. 384] I have just asked you?

A. Let's see—retardation on account of bilingualism is found among children who have not attended any school, pre-school children. They have attended neither the foreign language schools nor the English schools. It is also

found among children who come from foreign-speaking homes and who do not attend the foreign language schools, for example, Filipino children.

Q. Filipino children do not have any so-called language schools to attend?

A. That is correct.

Q. And is there retardation in the study of English so far as Filipino children are concerned?

A. There is.

Q. What about Portuguese children?

A. There is also some retardation in the case of the Portuguese, although they do not as a rule hear any language at home except pidgin English or perhaps something approaching standard English.

Q. What about Hawaiian children? First let me ask you, do Hawaiian children ordinarily attend so-called separate language schools in Hawaii?

A. They never do.

Q. All right. What about their retardation, if any, by virtue of the bilingualism situation?

[fol. 385] A. They are somewhat retarded in their English speech. In their case, as in that of the Portuguese, it would be due to a conflict, I presume, of the two dialects of English, pidgin and standard.

Q. Do you want to tell us now perhaps what role, if any, the matter of pidgin English plays in this problem, and what factor it is in the retardation?

A. Of the pidgin English and the problem of retardation?

Q. In the mastery of the King's English.

A. It is, I think, impossible to speak scientifically on that. And even as regards studies of retardation due to bilingualism, it is impossible to separate the two factors, bilingualism properly speaking and the conflict of the two dialects of English. It can be established that children from foreign-speaking homes have less English than those from homes which speak pidgin English. I think it can also be established that those who come from homes speaking pidgin English have less mastery of what we call correct English than those who come from the standard English speaking homes. But it is almost impossible to separate the various factors. However, Doctor Madorah Smith, who is one of the authorities in this field, specifically attributes some of the retardation and the mistakes made in English

to the—that is, in the standard English—to the prevalence of the pidgin dialect.

[fol. 386] Q. How prevalent is the pidgin dialect in Hawaii?

A. It is extremely prevalent. I can't recall the figures offhand which I arrived at, but I should say that somewhere around two-thirds of the population probably speak something that can be called pidgin.

Q. What is the origin, in a brief word, of pidgin English on the Islands?

A. Well, its early history is hard to determine because of the lack of references. As nearly as I can ascertain, after covering a great deal of the material, it started quite early, perhaps as far back as 1800, perhaps later than that, as the jargon spoken here is the seaport of Honolulu. And then, when the plantations were established, it was carried on to the plantations and perpetuated there by one group of immigrants after another.

Q. Who were the early immigrants?

A. The first immigrants were the—who came in any numbers—were Chinese, followed by Portuguese and Japanese.

Q. Now, to go back to the early line of inquiry that I started on, you have already said that there is some retardation due to bilingualism but that in your opinion none of the retardation, or at least very little, was due to the language schools. Will you explain your later answer?

A. The reason that I gave, that I have for that opinion, is this, that the retardation is largely an individual matter. [fol. 387] Some students make much greater effort than others. There are many factors which enter in, such as the character of the student, the encouragement that he gets at home, the type of language spoken at home. And I have observed students who have never attended language schools speak just as inadequately or just as faulty English as those who do.

Q. Now, you have mentioned the Symonds study, and I think you have said that in your opinion it is the only scientific study in the particular field, namely, the relationship of language schools and the mastery of English.

We shall see that this study is furnished to the Court, either the original or photostatic copy of the original. The original is in the Library of Hawaii, and I want to make some use of it at this time.

Do you or do you not agree with Mr. Symonds to the effect that correct speech—referring to correct speech in the Islands—has a worse enemy in the pidgin English of the home than the Chinese language school?

A. I'm not sure. Did Mr. Symonds, Dr. Symonds, make that statement?

Q. I have what purports to be a copy.

A. I have not the whole copy here, so I am relying on the notes.

Q. Do you accept that as a correct statement?

A. Yes, I do.

[fol. 388] Q. Now, with further reference to the Symonds study, do you accept his conclusion as follows:

> "I estimate that the influence of the home and playground is about four times as great as the Chinese language causing retardation in the English language."

A. I don't know about the four times. It is pretty hard to be so specific, that is, as to amount. I am certain that it is much more important than the language schools.

Q. Are you familiar with his statement as follows:

> "The second conclusion is that the effect of Chinese language schools on the English ability of those students is so small as to be negligible."?

A. I do, because his methods were careful and scientific.

Q. Do you accept the following conclusion of Mr. Symonds:

> "Taking Chinese children as you find them, they are not noticeably retarded in English because of attending foreign language schools. Chinese children who attend Chinese language school are neither younger nor older in their grades than those who have not attended the Chinese language schools."?

A. Dr. Symonds also demonstrated that.

Judge Denman: What year does this appear in the Symonds' thesis?

The Witness: It's in 1924; the study was made the pre-[fol. 389] ceding year, 1923, your Honor.

Judge Denman: That means that there is a generation in between——

Mr. Wirin: That's true. But there have been no scientific—

Judge Denman: —to pursue the acceleration of English.

The Witness: Yes, almost certainly.

By Mr. Wirin:

Q. Do I understand you correctly that there have been no scientific studies made to your knowledge on the subject since the Symonds study?

A. That is true. On this matter of the influence of the language schools a tremendous deal has been said but very little is known as scientific.

Q. Is it still considered an authoritative, scientific study, and the only one in that field now current?

A. It is, yes.

Q. You have said that you had occasion generally to observe particularly pertaining to language problems a large number of pupils in the public schools, and you observed Portuguese, Hawaiians, Filipinos, Puerto Ricans, as well as Chinese and Japanese?

A. Yes, I have.

Q. I think you have already told us that Portuguese and Hawaiians and Filipinos and Puerto Ricans do not go to language schools.

[fol. 390] A. That is true.

Q. What about Japanese?

A. Did I mention—did you mention Koreans? Some Koreans used to attend language schools.

Q. What about Japanese?

A. The great majority did.

Q. What about Chinese?

A. A considerable number.

Q. Were there proportionately more Japanese than Chinese attending language schools?

A. Yes, there were.

Q. Let's take Portuguese, Hawaiians, Filipinos, Puerto Ricans in one group for a moment, consisting of children who attended no language schools, and the Japanese children, on the other hand, most of whom attended language school. Have you observed any difference so far as the attainment of the English language is concerned by the groups as I have divided them now in two groups, Japanese

on the one hand, the persons who did not go to language school on the other?

A. No, I have not. I have noticed that it's been an individual matter. Some individuals in each one of those groups being outstandingly good, others outstandingly bad, and most of them mediocre.

Q. I think you have told us that the Japanese have gone [fol. 391] to language schools in larger proportion than the Chinese. Did you notice any attainment as far as English is concerned——

Judge Denman: Pardon me. He didn't say proportion. He said in larger number.

Mr. Wirin: All right.

Q. Japanese that go to language schools in larger proportion, proportionate number than Chinese.

A. Yes, they do, or did.

Q. Well, give us the proportion, if you know it?

A. I don't have them offhand. But roughly I should say that somewhere around eight or nine out of ten of the Japanese attended, and somewhere around four or five out of ten of the Chinese.

Q. Now, have you observed any difference so far as attainment in English is concerned between Chinese students and Japanese students?

A. None, unless perhaps some slight difference which might be attributed to the number of generations in this country.

Q. Would you say that the matter of attendance or non-attendance of language schools was an important factor in any difference that you observed?

A. Certainly not an important factor, and it isn't, was not apparent to me. Of course, there is this limitation: I have to go by impressions which I individually have got. [fol. 392] I have never made a scientific study of these children.

Q. But you are familiar in a general way with whether or not they go to language school?

A. Yes, I am familiar with that.

Q. Now, the language schools have been closed in Hawaii since 1941. Have you observed any change or improvement in the mastery of English by Japanese and Chinese students since Pearl Harbor?

A. I am inclined to think that there has been a slight improvement of all the groups in the schools, but that can be—at least in the schools with which I am familiar—but that can be attributed to other factors and to extend to the non-Orientals as well as to the two Oriental groups.

Q. Now, in the course of your inquiry in this general field, have you had a chance—strike that—have you observed whether or not there are any advantages claimed resulting from attendance of language schools?

A. Yes, there are numerous advantages claimed.

Q. What are some of those advantages?

A. One of them——

Mr. Flynn: May I interrupt a minute please? I am not too sure if the question is understood properly by myself. Is the witness asked for an opinion on advantages claimed or advantages that he has observed?

Mr. Wirin: Well, my question was "claimed". When I [fol. 393] said "claimed" I meant claimed by those conversant in the field. Yes, that's my question at the moment. I will ask him the next question after that.

Mr. Flynn: I'd like to know if first at the outset he made any studies of alleged advantages.

Mr. Wirin: Yes.

Q. Have you made any study or are — familiar with the alleged advantages of attendance at the language schools?

A. I have made no studies myself. I am familiar with a number of opinions which have been given as a result of observation. In a field like this, it is almost impossible to make a study, a truly scientific study, on quantitative grounds.

Q. But you are familiar with the opinions of students in the field?

A. Yes.

Q. On the subject of advantages?

A. Now, if I may take a little time to explain this. Dr. Romanzo Adams, who was professor of sociology at the University of Hawaii for many years, in 1925 wrote a little article called "Functioning of the Language Schools in Hawaii." He says that this is a result of three years of study——

Mr. Flynn: If the Court please,—I'm sorry, Mr. Reinecke, I wish to interrupt—I think if we get into the matter

of sociological advantages, it is immaterial to the Constitutionality of the statute.

[fol. 394] Judge Denman: Do you mean to say that if a very slight gain in language was there, and a greater gain in moral relationship, that it wouldn't be pertinent? Now, in the teaching of Chinese, suppose that in the teaching of the language there is brought into the conscience of children who are drifting into materialism their concept of so-called Christian civilization concept, but to get that thing they lose a certain proficiency in English in their youth, would you then say that that question is irrelevant to the discussion?

Mr. Flynn: Yes, I do think it is irrelevant, your Honor.

Mr. Wirin: We press our question, of course.

Judge Denman: He will answer it. The objection is overruled.

A. Of course, it must be borne in mind that this was written 24 years ago when conditions were considerably different in Hawaii. However, Dr. Adams said, I quote:

> "The principal function of the language schools of Hawaii is to reinforce the influence of parents, to increase their prestige in the eyes of the children. It appears that the children who attend language schools make better use of the agencies for Americanization than do the other children of aliens, and they are found in the juvenile courts less frequently."

He says, further, that the language schools help get better [fol. 395] jobs for those who attend them by teaching them speech correctly and read and write the language of their parents; second, that they prepare the students for life in the parents' native land, that is, in the case of those who return there, which naturally was a rather small number; third, that they make possible correspondence with the parents when the children are away from home.

Q. Are there any other advantages recorded in the literature in the field, in the studies?

A. There are a number of other advantages claimed. I cannot offer an opinion as to the validity of these claims.

Q. What is the nature of the claims?

A. One of them i that it encourages, that it helps form the moral character of the student.

Q. Moral what?

A. Moral character.

Mr. Flynn: I want to object.

Judge Denman: Will you offer literature?

Mr. Wirin: We intend to.

Judge Denman: That will speak for itself, then.

Mr. Wirin: Very well, I'll withdraw that.

Q. Now, in connection with your concern in this field, have you made some observations in connection with the matter of the so-called claim of emotional disturbance, conflicts and maladjustments? Let me ask you first whether [fol. 396] or not there have been any scientific studies in the field of bilingualism in general or in connection with language schools in particular so far as the problem of emotional conflict is concerned?

A. None whatever.

Q. Have there been any studies made?

A. None whatever to my knowledge.

Q. Do you have an opinion as to whether there is any causal relationship between the teaching of foreign languages in language schools and emotional disturbances, conflicts or maladjustments?

A. Yes, I have.

Q. What is that opinion?

A. It is, that if there were such disturbances that they should be apparent to one who has observed students over a period of a good many years; that the Japanese, most of whom attended the language schools, should on the whole show more emotional disturbances than the Chinese, and the Chinese in turn more than the Filipinos and the Puerto Ricans, who are largely bilingual but don't attend the schools; and that they in turn should show more disturbance than the haoles, Portuguese and Hawaiians or part Hawaiians. However, so far as my observations, this is not the case: Also, that there should have been a change for the better since December, 1941. And this also can't be [fol. 397] borne out by my observations at least.

Q. And, as I understand it, there are no authentic scientific studies in the field at all?

A. None whatever that I know of.

Judge Denman: Will you pardon me? Will you kindly think this over and put together what you think is the material for a real scientific study, what should a man gather, what statistics should he go to, what psychiatrists should he

consult, what methods of recordation of these disturbances, just how you would build up a scientific study of the thing? I'd like to get your viewpoint on that, because there may be others coming in here and saying "I made a scientific study." And I'd like to get the picture as far as I am personally concerned, a picture of what you think a scientific study would be in determining the effect of a language school, the effect of bilingualism, as distinguished between the effect of taking a fellow's baseball bat away from him in the afternoon for punishment, as distinguishing him from divorced couples, as distinguished from unhappy homes, all the other things that lead to emotional disturbance.

I take it, if I am correct, that if you have, for instance, here 200 emotional disturbances of Japanese people, how many of those are due to the home? Now, give us your idea of a scientific analysis, what it would be? And after you thought it over, if my associates agree with me, bring [fol. 398] it back and give us a picture of what scientific data should be produced.

The Witness: In the first place, your Honor, I am not tried in psychology, but I should say it would be very difficult to get any data on this. If, however, we found that a significantly larger proportion of Japanese students were referred by the school nurse or the school advisor to their doctors or to a psychiatrist or to any sort of counsellor in this field, then a significantly larger proportion of Japanese than of other groups—that at least might be a lead. Whether the lead would develop into anything, I don't know.

By Mr. Wirin:

Q. Even then, wouldn't it be necessary to ascertain each individual case?

A. It would.

Q. The home environment and other factors in the individual's life in order to determine whether or not the emotional disturbance was due to a frustrated love affair or to efficiency in Chinese?

A. It would.

Q. Well, in any event, no such or comparable study has been made to your knowledge by anyone here?

A. No, there has not been.

Q. Now, turning for the moment away from the problem or problems in the Islands, have there been studies made [fol. 399] concerning bilingualism and mental achievement generally?

A. There have been, yes.

Q. What has been the nature of those studies?

A. Well, they have been of extremely varied nature. Some of them, for example, have been detailed studies of the linguistic and the incidental social development of small children brought up in bilingual homes. There are at least four such studies. Others have compared the intelligence or the academic standing of bilingual children with those who speak only one language.

Q. Can you give us a general idea as to the extent of bilingualism, first in the United States?

A. It is extremely prevalent in certain states, particularly some of the northeastern states and some of the north-central states.

Q. What is the nature of the bilingualism in those respective places?

A. Approximately the same as it is here except perhaps not so extensive, that is, it is bilingualism of immigrants, and in many cases I suppose second and third generations.

Q. Well, is bilingualism a more or less common pattern in American life so far as immigrant communities are concerned?

A. It is.

Q. The pattern would be in New York City where there [fol. 400] is a large number of immigrant people?

A. At one time, I believe, New York State had about 50 percent of its population bilingual.

Q. What middle western states have had a large percentage of bilingualism?

A. Naturally those with the large cities, such as Illinois and Wisconsin, and also North Dakota is outstanding where there are many Scandinavian people.

Mr. Flynn: If the Court please, I'm sorry to interrupt again. Is this as to a discussion of bilingualism elsewhere or is it going to lead to studies concerning bilingualism?

Mr. Wirin: Yes, right now.

Mr. Flynn: All right.

By Mr. Wirin:

Q. Now, in communities other than Hawaii where there is bilingualism, are there language schools to which immigrant parents send their children?

A. I understand that there are, or at least have been, but I don't know without looking it up to what extent. I understand that in certain of the German-speaking and Scandinavian-speaking communities there are or were until recently rather common.

Mr. Wirin: You may cross-examine.

Mr. Flynn: I might ask the Court until what time we expect to continue? If it is to be only four o'clock, I would [fol. 401] start cross-examining, but if it is to be later than that I would suggest a short recess so I can assemble my material.

Mr. Wirin: This is our last witness except for certain matters which we may stipulate to.

Judge McCormick: Do you think you will finish your cross-examination by four o'clock?

Mr. Flynn: I don't think I could, your Honor.

Judge McCormick: You probably could conserve time if you had until morning to form the nature of your cross-examination.

Mr. Flynn: It might help some. It might cut down a few possibly repetitious questions.

Judge McCormick: Can you give the Court any indication as to how many witnesses you will produce?

Mr. Flynn: Yes, your Honor. It is approximately 12, of whom at least half will speak quite briefly, and approximately the other half would speak considerably at length maybe comparable to this witness' testimony.

Judge McCormick: Half would be expert witnesses?

Mr. Flynn: Yes, they will all be experts to varying degrees.

Judge McCormick: About what length of time would you suggest that it will be necessary?

Mr. Flynn: For my witnesses, I would say two full days. [fol. 402] Now, if this is the final witness for the Plaintiffs, ours would start not long after nine o'clock tomorrow morning, say ten o'clock, which would be certainly a full day.

Judge McCormick: Do you think you will have some rebuttal?

Mr. Wirin: It is likely.

Judge McCormick: You still think that your suggestion that we finish this case and have it ready for submission by the third of July is applicable?

Mr. Wirin: I think so.

Mr. Flynn: I think so, too, your Honor, but it depends a great deal on the extent of the cross-examination of my witnesses. Well, I am not going to pin counsel down in either direction.

Judge Denman: We will recess until tomorrow morning. Put this witness on at nine o'clock tomorrow morning.

(The Court recessed at 3:45 o'clock, p. m.)

[fol. 403] Honolulu, T. H.,
June 27, 1947.

The Clerk: Civil No. 765, Mo Hock Ke Lok Po, an eleemosynary corporation, and others, versus Ingram M. Stainback, and others, for further trial.

JOHN E. REINECKE, a witness in behalf of the Plaintiffs, having previously been sworn, resumed and testified further as follows:

Judge Denham: Your witness is on the stand.

Mr. Wirin: You may cross-examine. May I say, Doctor, that if there are any other books that are here that you will want in answer to any questions, will you ask for them and we will bring them to you?

Cross-examination.

By Mr. Flynn:

Q. Mr. Reinecke—Dr. Reinecke, isn't it?

A. Yes.

Q. You stated that to your knowledge there had been no studies or research of the question of language school attendance and bilingualism since Dr. Symonds' report in 1924?

A. No, I did not state that, I believe. I said that there have been several studies made of bilingualism but none of

the effect of the attendance at language schools upon the student or the children's English.

[fol. 404] Q. I see. I believe you also stated that Dr. Madorah Smith is a recognized authority on this question.

A. That is correct.

Q. You regard her work as quite reliable?

A. I do.

Q. Do you happen to be familiar or have heard of her study in 1932, printed in the Journal of Genetic Psychology, entitled "The Direction of Reading and the Effect of Foreign Language Attendance on Learning to Read"?

A. I undoubtedly have read it. I haven't it at hand now.

Q. You don't have any recollection of that study?

A. No, sir, not offhand.

Q. Have you had occasion to come across any of the theses at the University of Hawaii concerning language school study?

A. I think that I have looked through all of them.

Q. Do you recall the work by Ayoko Kono, in 1934, "Language as a Factor in the Achievement of American-born Students of Japanese Ancestry"?

A. Yes, I do.

Q. You don't regard that, however, as directly bearing on the problem now before the Court?

A. As I recall that study, that deals with the influence of language in general, not with the attendance at language [fol. 405] schools specifically.

Q. I see. Now, you have testified, Doctor, that there is an existing language handicap among the majority of the residents of our Territory?

A. Yes, there is.

Q. And that is equally true as to the school children in our Territory?

A. May I—I'm not quite sure that I understand the question. You mean that it also exists among the school children?

Q. Yes.

A. To the same extent that it exists among the adults?

Q. Yes.

A. I do not believe that it exists to the same extent as among the adults for the obvious reason that many of the adults learn their English in their later years, while the students in the schools now, most of them have spoken English of one sort or another from their infancy.

Q. Well, more specifically, then, aside from any comparison with the adults in the Territory, is there an existing language handicap among children in our grade schools?

A. Among many of them, yes.

Q. Do you regard that as a serious language handicap?

Mr. Wirin: You are talking about English?

Mr. Flynn: Yes.

[fol. 406] Mr. Wirin: I assume there are other languages besides English.

A. Yes, it is serious if one is considering English as a language. I don't know how serious it can be, how serious it can be considered, taking the whole educational picture into consideration.

Q. Do you, Doctor, have any opinions concerning the progress of our school children? For example, in the sixth grade as compared with mainland school children in the same grade?

A. From what I know of the studies made here, it is somewhat behind the mainland norms.

Q. Below the mainland norms? I beg your pardon?

A. Below the mainland norms.

Q. Do you, Doctor, have an opinion as to whether that retardation is due to English language deficiency?

A. I have. I think that it is due to English language deficiency in two respects: one, lack of vocabulary, and, two, confusion of the pidgin English forms with the standard English forms.

Q. Now, Dr. Reinecke, do you happen to be familiar with a publication known as the "Community Survey of Education in Hawaii", published in 1941?

A. I have read through it. I don't remember all the details of it.

[fol. 407] Q. Do you have any opinion as to whether you agree or disagree with the findings of the committee on English in the schools?

A. I should have to reread them now before I could offer a valid opinion on that.

Q. I see. I would like to read one brief sentence to you and see if you concur with the finding:

> "The English speech of children when they enter the first grade in Hawaii is 2 or 3 years, on the average, behind that of mainland children of the same age."

A. From what I have seen of studies, that is true—specific theses on which that statement is probably based.

Q. Now, I'd like to read one further sentence:

> "The amount of poor English is considerably greater in pupils' speaking than in their writing. This seems to show that children often know more about what is right in English than is shown in their everyday language."

A. I don't fully agree with that, because I think that there is a basic misconception in that statement. Children speaking naturally speak in their home dialect, which is pidgin. People writing write the only model which they have, namely, the standard language, standard English here. So that one may say that the students are not so much speaking incorrectly as speaking naturally. While they are [fol. 408] writing letters to a large extent naturally, because the written English that they have learned is standard English, it is a matter of a conflict of two English dialects, not so much a matter of differences of correctness. And on that point I might refer to an article which appears in the latest "Social Process in Hawaii' by Mr. Bernard Hormann. H-o-r-m-a-n-n, I believe it is spelled. The study is that small blue pamphlet on the top. (Mr. Char hands witness a small book) The title of the article is "Speech Tragedies and the School in Hawaii", appearing in the "Social Process in Hawaii", Volume 11. Mr. Hormann discusses the problem and he points out that it is a matter of, shall we say, non-recognition of the local dialect on the part of the teachers which regards, which causes it to be regarded as poor English, incorrect English.

Q. I have one further reference here, Dr. Reinecke. It reads as follows:

> "In the oral language of seniors in regular high schools, there is a larger proportion of errors in English than in the speech of first-grade children in English Standard schools. In written composition the same seniors make about as many mistakes as are made in the oral language of English Standard sixth grade pupils."

Does that sound reasonable, reasonably accurate to you? [fol. 409] A. It does, but it needs interpretation again.

Q. Very well.

A. The high school seniors have heard much more pidgin English and have been in a pidgin-speaking environment to a greater extent, I believe, than the first graders, particularly those who attend the standard schools. Now, in the standard schools, as is known, an oral English test is administered. The students who are enrolled in these schools naturally come from the homes where standard English or an approximation to it is spoken. So that they have a double advantage. In the first place they are younger, they have been brought up in an environment where they have heard more standard English all about them. In the second place, they are a select group coming from homes where standard English is spoken.

Q. How about this further finding in the written composition, "the same seniors make about as many mistakes as are made in the oral language of English Standard sixth grade pupils"?

A. That also is very likely because pidkin English forms are carried into the composition of many of the students.

Judge Metzger: I think you should elucidate what you mean by English standard school. You mean the particular type of school that was set up here in Hawaii and designated as English standard school?

Mr. Flynn: Yes, that's what I mean. The term "English [fol. 410] standard school," your Honor, is a school whose English requirements both as to teachers and pupils are substantially similar to that on the mainland.

Judge Metzger: Local institution?

Mr. Flynn: Beg your pardon?

Judge Metzger: A local institution?

Mr. Flynn: Yes.

Mr. Wirin: But I assume it will be further stipulated that the English standard school is different from the regular public school where all of the children except those specially proficient in English are permitted to attend. That's correct, isn't it? In other words, public schools, the public school system here is composed of two kinds of schools?

Mr. Flynn: Yes.

Mr. Wirin: One is an English standard school, with respect to which the students are expected to pass certain requirements in English before they are admitted; and

then the remaining schools. The issue in this case is not the same as in the Westminster School District vs. Mendez case. There is not that segregation.

Mr. Flynn: I think we will have that clarified by the Court or possibly by other witnesses, or possibly Dr. Reinecke could outline the difference between the English standard and the regular public schools.

A. I think that that has already been brought out pretty [fol. 411] fully.

Q. Is what we have said here substantially in accord with your understanding?

A. Yes. The course of study in all the schools is substantially the same.

Q. Very well. Now, Dr. Reinecke, you testified on direct examination that you believe there has been some improvement, I think you said, some slight improvement, in English in the past six years; in other words, since the time the schools were closed.

A. At that time, yes. I was relying on my memory. I went this morning to the Department of Public Instruction, to the office of Research, Tests and Measurements, which is headed by Dr. Alfred Church, and got what material he had available there. I have not had time to digest this fully but looking it over I find that—let's see—I find that a progressive achievement test was given to the sixth graders, to the ninth graders, and to the twelfth graders in 1940, and the same test in 1947. In the sixth grade—now, this is the sixth grade in those years, not the same students, there were virtually no improvements between 1940 and 1947 in reading vocabulary and reading comprehension. In grade nine there was a slight decline in reading vocabulary, a slight increase in reading comprehension. In grade twelve, a slight decrease in reading vocabulary and con- [fol. 412] siderable decrease in comprehension.

Q. Were there not some other subjects of inquiry?

A. There were.

Q. Specifically, language?

A. There was language. However, language is a matter of mechanics. It includes knowledge of the rules of capitalization, of punctuation, of spelling, and also the ability to recognize a complete sentence. Now, in that the twelfth grade showed a decline, the ninth grade an improvement, the sixth grade a slight improvement. But I should not be

inclined to regard the scores in language as nearly as significant as those in vocabulary and comprehension.

Q. Now, you have, as I say, previously expressed your own opinion from observation that there has been some improvement in the last six years. Do you regard this——

A. I think there is some improvement in the world English.

Q. Do you regard this test as sufficiently general and reliable to change your opinion to any extent?

A. The test does not cover oral English at all.

Q. So you still believe that there has been some improvement in oral English?

A. That is my own personal observation which, of course, is purely unsupported by any objective measurements.

Q. Now, have you been teaching in the high schools, Dr. [fol. 413] Reinecke, for the entire past six years?

A. I have not. I have taught in the senior high school for the past three years.

Q. And before that time where were you teaching, or rather what grades?

A. Immediately before that I had the ninth grade for five years.

Q. And have you at any time taught the primary grades in the Territory?

A. I have not.

Q. You have always been in the upper grades?

A. Yes, from the seventh on up.

Q. Now, we have previously discussed, Doctor, the matter of the English speech of children on entering the first grade, and I think we have substantially agreed that it is between two and three years on the average behind that of mainland children in the same grade. With that existing defect, do you have an opinion as to whether the taking up of a foreign language study by those children at that same time would have any effect on their progress in their English studies in the schools from first grade on?

A. Yes, I have. Until very careful studies can be made to prove the contrary, I should be inclined to think that it would have a negligible effect one way or the other upon their progress in English.

[fol. 414] Q. Now, specifically, if such children were to study Oriental languages about which you know as much as the rest of us, that it reads from right to left and up and down, that is, in ideographic languages as distinguished

from alphabetical languages, do you have an opinion as to whether that would have any effect, as distinguished from a European language which is more similar to the English?

A. I don't think——

Mr. Wirin: I am going to object to it because, after all, this statute is not aimed against ideographic or Oriental languages. This statute is aimed against every language. Therefore, I would suppose that any difference there may be between the languages is really immaterial in the instant challenging of the statute on its face. Now, I make that objection.

Judge Denman: What would you say to this suggestion, Mr. Wirin? We are concerned with education, and here are maybe 25 percent that would be adversely affected by the legislation, and say 75 percent would be favorably affected by it. Now, in the 75 percent are the Oriental languages and the 25 percent are the European languages. Now, what would you say to the suggestion that the legislative body controlling the education of the youth within this limitation of control could say, well, it is very true these Europeans lose something but those over here, the main people, will be benefitted? And the anger across the com-[fol. 415] munity would begin. What would you say to that thesis?

Mr. Wirin: I would say that that thesis is not sustainable in a statute affecting civil liberties, because, as I understand the applicable Constitutional test,—and it's a fairly recent one—it is that such statutes are to be judged by the possibilities of abuse, unnecessary actual abuse. And if the statute is so broad that it is capable of abuse even as to a small group, then the statute is too broad and too vague and un-Constitutional. And that is the situation here where we are challenging the statute. In other words, formerly the rule was, as I understand it, that before one could effectually challenge a statute, he had to show that he was prejudiced by its enforcement, that it applied to him and he was a subjected victim of it. The recent cases do not require such a showing but permit the courts to nullify statutes if they are so broad that they are capable of enforcement against anyone in an arbitrary manner. Now, I think that would be one answer. If I had a little more time for further thought perhaps there might be additional answers to it. I will say I don't in a way seriously object to these questions because I assume that these questions con-

tained the claimed justification for the statute, but I do think it should be borne in mind that this statute, according to counsel himself, doesn't cover merely Orientals but also covers European languages and schools as well.

[fol. 416] Judge Denman: The objection will be overruled, although, of course, subject to renewal if you establish a thesis later on.

Mr. Flynn: We disagree violently with the thesis, too, your Honor. I'd like to say that these plaintiffs haven't established their case concerning the Chinese language. I think we are entitled to cross-examine as to that matter specifically.

Mr. Wirin: But you are considering that this statute covers all languages, including Hawaiian?

Mr. Flynn: Yes.

Judge Denman: It has been repeatedly conceded. It is not only by voice but document in the record. And it includes all, Sanskrit and other languages.

By Mr. Flynn:

Q. Do you recall the question?

A. May I have it?

(The reporter read the last question.)

A. I have no valid opinion because so far as I know there has been only one study made along that line.

Q. Do you have a personal opinion as an educator?

A. No, I have not, because I have had no way of observing the difference in difficulty of learning the languages written in Chinese, in the Chinese manner, and those written in the European.

[fol. 417] Mr. Flynn: I have no further questions.

Mr. Wirin: I have a question or two.

Redirect examination.

By Mr. Wirin:

Q. You talked about a study which was made and in respect to which you referred to when you were examined this morning. And you said that there was evidence of some improvement in English, as you limited it. Now, does this study—correct that—as I understand it, the Chinese and Japanese language schools have been closed since 1941, and,

as you testified, members of other racial groups like Puerto Ricans and Portuguese and Hawaiians have never attended any so-called language schools. Now, this study which you have made reference to, was it a study which was limited to Chinese and Japanese, namely, persons who formerly attended language schools prior to '41, or did this study include all persons, all children no matter their race?

A. This study covered all children.

Q. So that such improvement as appears for the Chinese and Japanese on the one hand was also for the Portuguese, Hawaiians, and all other children who did not attend any language schools?

A. Yes, that is true, but I think that you misapprehend my testimony. These averages do not show any marked improvement in the reading vocabulary and comprehension. [fol. 418] They show a decrease in the twelfth grade, an increase in one and a decrease in another in the ninth grade, and virtually no change in the sixth grade.

Q. In other words, no evidence of any improvement since the closing of the so-called language schools?

A. So many factors are in that, that I don't see how they can be disassociated. They are all interwoven, and the study, as far as I can see, shows just the amount of improvement or the amount of regress. It doesn't show the causes thereof.

Judge Denman: Doctor, do I understand that those studies, those figures that you got yesterday afternoon or this morning, had the segregation of Chinese and Japanese, or did that cover all languages, all basic languages?

The Witness: They cover all the students regardless of ancestry.

By Mr. Wirin:

Q. In other words, in any event, that study is not a study of the effect of a language school upon English in the public schools?

A. No, it is not.

Q. The only such study I believe you testified is the Dr. Symonds study, which is many years old?

A. Yes, and then there is——

[fol. 419] Q. The Schwartz study?

A. —the Schwartz study, if it can be called a study.

Mr. Wirin? That's all.

Judge Metzger: Do you know, Doctor, whether there has been any greater effort made during the last two or three years, or four years, than there was formerly, through the public press and other influences, in a campaign to improve the use and the speaking of better English in Hawaii in the homes, in the offices and on the streets generally?

The Witness: Yes, there has been, your Honor. I don't know to what extent that has had any effect on the public outside the schools. I know that there is considerably more need for the use of good oral English in stores and offices than there was a few years ago. In the schools I know that in the two schools where I have taught there has been increased emphasis upon improvement of oral English.

Mr. Wirin: I have a further question.

By Mr. Wirin:

Q. Do you know whether or not on the Islands there are a number of teachers, particularly the older ones, whose facility of the use of English is less than the facility of the use of English by teachers on the mainland? I mean so far as enunciation and expression is concerned.

A. I have known a number of such teachers. I don't know how many there are.

[fol. 420] Q. In other words, does the vice of pidgin English affect some of the teachers in the schools, the older teachers? I say "vice". I mean the practice of pidgin English.

A. I believe that it does. But I should hate to venture an opinion on the extent.

Q. Well, is pidgin English considered a major vice?

A. Many educators regard it as such.

Q. Do you?

A. No, I don't.

Mr. Wirin: I think that's all.

Mr. Flynn: No further questions, your Honor.

Judge Denman: No further questions?

Mr. Wirin: No further questions.

(Witness excused.)

Mr. Wirin: Your Honor, we are ready to rest our case, subject to this qualification: Mr. Flynn and counsel for the plaintiffs are attempting to work out a stipulation as

to certain facts, which are procedural matters, essentially the matter of damages, and we hope to have that ready soon. And if perchance the stipulation doesn't cover all of the matters, we may want to introduce a little bit of testimony in that field. Short of that, we are ready to rest, because we think the Court wants to hear the major witnesses.

Judge Denman: You say you desire to have certain issues which may not be stipulated upon introduced in evidence, [fol. 421] to introduce evidence on them after the closing of this case?

Mr. Wirin: Yes. But in any event that evidence will be very brief and informal.

Judge McCormick: Did I understand you to say on the question of damages?

Mr. Wirin: Yes, I did say that. All I meant was, while that issue is not technically in the case, we do want to make some showing to support the allegation in the complaint as to the nature of the property owned by the plaintiffs who have language schools, and the amount of damage they will suffer were the statute enforced, which I say is strictly not necessary in view of the amended complaint.

Mr. Flynn: That procedure is agreeable to the defendants, your Honor.

Judge Denman: Proceed.

Mr. Flynn: I wonder if I might suggest a brief recess even at this early hour before starting our case? If we have a recess, I will get our witnesses together.

Judge Denman: We will take a recess for ten minutes.

(A short recess was taken at 9:45 a. m.)

After Recess

Mr. Flynn: If the Court please, we will call Dr. Loper,

W. Harold Loper, a witness in behalf of the Defendants, being duly sworn, testified as follows:

[fol. 422] Direct examination.

By Mr. Flynn:

Q. Your name is Harold W. Loper?
A. W. Harold Loper.

Q. And you are the Superintendent of the Department of Public Instruction of the Territory of Hawaii?

A. That's right.

Q. And named as one of the defendants in this case?

A. Yes.

Q. How long have you been in your present occupation, Dr. Loper?

A. Since last August—oh, occupation?

Q. Well, your present job.

A. Position—August 1, 1946.

Q. And what position did you hold prior to that?

A. For six months Deputy Superintendent in the Department of Public Instruction.

Q. And prior to that?

A. Co-Chairman of the Territorial War Labor Board for Hawaii.

Q. And have you had any other service with the Department of Public Instruction?

A. Yes, my service began in 1921 as a teacher.

Q. And will you outline briefly your work with the Department following that beginning?

A. Two years as a teacher, one as principal of Konawaena [fol. 423] school, three as principal of Kauai high school, two as supervising principal of West Hawaii schools. And then, beginning in 1930 until the war, supervising principal of Honolulu schools.

Judge Denman: Will you give the grade of those schools, the character of the schools?

Q. Starting from the first school, Dr. Loper, what was it, was it a primary or elementary school?

A. The school in which I taught had grades from one through ten and later through twelve. I was teaching in grades nine and ten. The schools I have been principal of, Konawaena school had all twelve grades; Kauai high school had four grades, ninth to twelfth inclusive; and the District of West Hawaii and Honolulu, of course, schools of all grades.

Judge Denman: High school begins at the ninth grade?

The Witness: It begins at the ninth grade and in some cases tenth grade if it is a six-three-three organization.

Q. In your work as supervising principal, then, you worked with all the grades from one to twelve?

A. That's right.

Q. Now, just briefly, Dr. Loper, your own educational background starting from the college level?

A. I graduated from Redlands, California, in 1921, and took a Master's degree in education at Harvard in 1925, and another degree at Columbia in 1939.

[fol. 424] Q. In 1939 you received your Doctor's degree?

A. Doctor of Education.

Q. Doctor of Education. Now, in your position, of course, Doctor, your present position, you are familiar with this law known as the Foreign Language Law?

A. Yes.

Q. I'd like to refer you to Section 1873 of that law, "Requirements for Pupil." On approximately the sixth line it states: (The pupil) " . . . shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the department of public instruction attaining a score not lower than normal for his grade." Can you state briefly the proposed policy to be followed by your department in enforcing that section?

Judge Denman: First tell us what the word "normal" is on the statute's interpretation? What does "normal" mean in the statute that you are asking him to interpret?

Q. The word "normal" for his grade——

Mr. Wirin: Now, your Honor, we object to that on the ground that the plaintiffs are challenging the statute upon its face, and any interpretation or deviation or even construction by the school authorities is immaterial. The question before the Court is purely a question of law as to the meaning of this statute. Particularly if your Honor will [fol. 425] bear in mind that one of the essential features of our challenging is not necessarily that the law as enforced deprives anyone of rights but that the law upon its face is so broad as to be capable of deprivation of a person's rights.

Judge Denman: Well, suppose in the profession of education this word "normal" has a perfectly definite and prescribed meaning? Now, in the interpretation of a statute I ask this as a question, not as a ruling: in the interpretation of a statute can't you find out what in an area covered by this legislation a word means?

Mr. Wirin: Your Honor, I think you are entirely correct. But that is not the question which was asked of this witness.

Judge Lenman: The question that I put to this witness was, what was the meaning of the word "normal" as used in the statute that he is asked to talk about.

Mr. Wirin: Well, your Honor, I don't consent to that either because I don't think this witness is competent to talk about a statute. Lawyers presumably have some competency and the judges the final competency. I have no objection to the line of inquiry whereby this witness as an expert is asked whether or not there is a standard test, and if so, what it is, and if there is in the field of education a recognized definition of the word "normal". But I think the question should be asked in that form and for that purpose rather than in the context of the particular statute, [fol. 426] because if we do the latter we will have the witness telling the Court as to what this statute means, which I'd rather need not have him do. That is the function of a lawyer. And what the vice I'm trying to avoid is, I want to avoid a witness rather directly being called to support a statute. He is being called to give evidence pertaining to——

Judge Denman: If may not support a statute at all. We may go exactly the opposite way. But there is a phrase that apparently is a phrase of his profession. Now, how does his profession interpret a word which has or may have a professional meaning which gives definiteness and clarity to the statute which you claim it doesn't contain? Your whole position here, or one of your positions, is that the statute is too indefinite to tell anybody what it means; therefore, it has to be dropped as a vague attempt to regulate the Constitutional area.

Mr. Wirin: May I just explain my position? I have no objection to an inquiry of this witness as to whether there is a standard test and what it is. Perhaps we are both talking about the same thing, then.

Judge Denman: The objection is overruled. Will you answer my question?

The Witness: We can give no complete answer to that question without discussing two phases of it. Standard tests——

[fol. 427] Judge Denman: No. My question is, what does "normal" mean in the statute, or rather what does the word "normal" mean in your profession?

The Witness: In my profession "normal" has two meanings: one meaning is the thing that is normally expected,

the thing that occurs in most cases. It is normal, for example, for children to vary in ability and for most of them to pass on from one grade to the next on the basis of the opinion of the teacher, supported by tests that she would prepare and give and tests that may be purchased and given, the latter being standarized tests. We also have the other form of the word "norm", grade norms and age norms, which refer to the score made on a standardized test by hundreds or thousands of children of a given age or given grade. And we have been to considerable trouble in recent years to call the attention of teachers to those two meanings of "normal", because in the one case if you are dealing with the average mark made by children in the fourth grade, it implies by definition that some will be well above the average and some below. But it does not mean that they would not all pass. It is normal for the majority to pass on into the fifth grade.

Judge McCormick: Well, Doctor, will that test of normalcy depend upon the individual attitude in presenting features——

[fol. 428] The Witness: In part, part on tests that the teacher would give, and in part on tests that are prepared and given and tests that she would acquire from the tests. In part—your question was, would it depend upon her opinion?

Judge McCormick: Yes.

The Witness: My answer is yes, it would be on her opinion and the results of tests which she would prepare herself and give to the children, and in part on the published standardized tests which are purchased and used in the schools of the Territory.

Mr. Wirin: Will you keep your voice up just a little?

The Witness: Yes.

Judge McCormick: What is the recognized form to be adopted by all teaching professions? There is no fixed formula, is there, to which every teacher would have to subscribe in ascertaining what would constitute normal?

The Witness: I think a fair and accurate answer to that would be No, because there are so many factors involved in the decision concerning the advisability of promoting a child from one grade to the next. In general the standard that is to be attained by children in various grades is something that the teachers have pretty well in mind, when they know the work that is to come in the year

following. And the records show that the number of children in a hundred percent age of those do not pass on from year to year ranges from around four percent to [fol. 429] about eight percent, meaning that 92 to 96 percent pass at the end of the year from one grade to the next.

Judge McCormick: To that extent, then, there is some standard?

The Witness: That's right.

Judge Denman: Well, Doctor; it is entirely possible that here we would have a teacher who is highly sensitized to the passing of children; in other words, the line of degrees will vary from San Francisco. I just can't see it. You will have one teacher saying, Here, I could see that this child pronounces English way below the average, and its rapidity of apprehension, its understanding of what happens next is below the average. And one teacher will do one thing and the other will do it another way in a situation. It's just the ordinary difference in a human being and in their understanding of other human beings. So you'd have a variance there, wouldn't you?

The Witness: That is true, you would.

By Mr. Flynn:

Q. Dr. Loper, does your Department of Public Instruction have now such a thing as standard tests in English?

A. We have standardized tests which include tests, sections in English, on English.

Q. Maybe I will enlarge on that a trifle. Standard tests in English composition and reading, does your department [fol. 430] have such a thing now?

A. You are reading from the statute?

Q. I am, yes.

A. We have——

Mr. Wirin: That's just the vice that I'm complaining of, that this witness ought not to be concerned about the statute. The question is, Are there standardized tests? That's what we want.

Mr. Flynn: That's the question, yes.

A. In order to answer it, I'd like to ask if you make any distinction in your question between the words standard and standardized? We make a technical distinction, at least I do in my thinking. A test which has been carefully de-

signed and then given to thousands of children to arrive at a score, a norm, is a standardized test. They come to us in printed form and are used in the various grades of the school. The word "standard" has a less technical meaning, as referred to standard requirements to pass from one grade to another. And tests are made by teachers and given by the teachers.

Q. Now, referring to the standardized tests, are they presently given from time to time in our Department of Public Instruction?

A. Yes.

Q. Is there any set rule in our department as to how [fol. 431] often the tests will be given or in what grades?

A. They have been given in grades nine and twelve and six. I believe during the past year they were given in those same grades and the third grade. They are given in all grades from time to time, the tests in the grades that I mentioned. By that I mean throughout the Territory, so that we will have a result that would reflect the progress made in all schools of the Territory. But any class in any school may and does use standardized tests.

Q. Now,—I might preface this a little bit—I think I am entitled to ask this witness some further questions about this section of the statute, as to be applied by his department, the Department of Public Instruction. And I will ask the question and see if there is any objection. Referring to this section, Dr. Loper, you have stated that our department now gives standardized tests from time to time in all of our grades. In the question of enforcing this section of the foreign language law, is there to be any other or additional type of test differing from that which has and is being given from time to time?

A. No.

Q. For the purposes of this law, then, the policy of our Department of Public Instruction will be identical with the heretofore existing policy concerning the giving of tests in English composition and reading throughout all the [fol. 432] grades of our schools?

A. Yes.

Q. And with regard to the requirement that a pupil who is attending a foreign language school comply with this section, is he to have anything other than a passing grade for his class in such tests?

A. No.

Mr. Wirin: Objected to as leading.

Judge Denman: Passing grade in English, you mean?

Mr. Flynn: Passing grades in English composition and reading.

Judge Denman: Not in the entire area?

Mr. Flynn: No, in English composition and reading.

Judge Denman: What would you say, Doctor, then, that a person who is unable to pass in English, although he is promoted from one class to another, would at the age of 15 years be kept from learning foreign languages, is that correct?

The Witness: I would need to read the statute. That's my understanding of it.

Judge Denman: Then if a parent says, I don't mind my child not speaking English so well, he'll get along, I hope he'll be a priest and I want him trained in Latin and Greek, particularly in Latin, during the period of time that he is in his fifteenth year, if he is deficient in English he couldn't [fol. 433] have his Latin, is that correct?

The Witness: That's correct. I might add, however, that the records show that the youngsters who make passing marks in their other subjects nearly always make passing marks in English.

Judge Denman: Well, then, that means that this law was passed because of deficiencies of four to eight percent of the people, is that correct?

Mr. Flynn: No, I wouldn't go with that, your Honor.

Judge Denman: I'm asking him. He just stated to us that—am I correct?—that from 92 to 96 percent pass, and the great bulk of these people would pass and pass in English.

The Witness: That's right.

Judge Denman: It occurs to me, as one of the Judges, that the area of wrong sought to be cured in the community is confined to the four to eight percent of pupils. I may be wrong in that. I am suggesting it to you in the course of your examination. You see, where one of the Judges is drifting is with regard to the extent of the evil sought to be corrected at the expense of the parents' choice of what the child should do.

Mr. Flynn: I think we may cover that, your Honor, as we go along.

Q. Dr. Roper, turning from the statute and all matters directly concerned with it, I will ask you if you have an

[fol. 434] opinion as to whether there is any serious English language deficiency in our elementary schools at the present time?

A. I would say yes, there is a serious deficiency.

Q. Will you describe to any extent the deficiency existing in the first grade in our schools?

A. Studies that have been made indicate that children come to our first grade with a deficiency in English vocabulary amounting to one to two years or perhaps more as compared with children who come from English-speaking homes on the mainland.

Q. Is that deficiency, then, very widespread throughout our first grades?

A. By that you mean, do we find it in all schools of the Territory?

Q. Yes.

A. Or among all children?

Q. Yes.

A. I think the answer would be Yes. You will find a difference, of course, in the English standard schools where admission is based upon passing an oral examination in English. The vocabulary of the first grade child in English standard school would be more nearly that found on the mainland.

Q. Just offhand, Doctor, can you state approximately the percentage of standard schools in our Department of Public Instruction to the other schools?

[fol. 435] A. We have six such schools in the city out of a total of some forty-four schools. There are four elementary, one intermediate, and one high school in the City of Honolulu.

Q. So around one-seventh to one-eighth of our schools, then, are the standard schools?

A. If you get the Roman figures which would give you a percentage in English standard schools.

Judge Denman: Is that one-eighth of this island or for the entire Territory?

Q. Can you state that, Doctor?

A. Well, there are English standard schools on the other islands, but we have no high school, English standard high school on the other islands.

Q. Can you give any approximate figure, then, with reference to the entire Territory?

A. Not offhand. I could make a guess but I'd rather get the figures for you.

Q. What is the approximate guess?

A. Oh, I suppose about 15 to 20 percent of the enrollment would be found in English standard schools.

Q. And it's 80 to 85 percent of our school pupils that are in the other than English standard schools?

A. That's right.

Q. Our regular schools. Now, referring, Doctor, to this existing deficiency in a large portion of our first grade [fol. 436] pupils, existing language deficiency, do you have an opinion as to whether in a situation where those children should thereupon commence their studies of a foreign language, would they be hindered or handicapped in the accomplishment of their regular school work?

A. Well, it's my opinion that they would be.

Q. Is it your opinion that they have been for many years?

A. Yes.

Q. Now, in your work in the supervisory principal position and principal, have you found that our teachers have any grave or serious problem concerning the handling of English in the early grades in the schools?

A. Yes. The first grade teacher frequently finds one of her first problems is getting the children——

Mr. Char: Isn't that hearsay evidence? I mean the question. He is testifying as to what he heard from the teachers, from the elementary teachers.

Mr. Flynn: It is slightly sounding in hearsay, your Honor. I think he can testify as to existing conditions, even though that will include reports or statements made to him by teachers. I think it is consistent with his position. He testified to that.

Judge Denman: Well, if those reports would be received in the normal pursuit of his profession as principal, the [fol. 437] problems that the profession would have to solve, to deal with and solve, the opinion may be based on that. Your objection is as to the actual statement of the teachers to him?

Mr. Char: Yes.

Mr. Flynn: Well, I'm asking for the opinion, if the Court please.

Mr. Char: He has already given his opinion.

Mr. Flynn: May we have the question read?

(The reporter read the last question.)

Mr. Wirin: It's also leading and suggestive.

Mr. Flynn: There was an explanation coming, and I think it is properly allowable, your Honor.

Judge Denman: Will you frame your question fully so we can rule on it? Apparently that was an unfinished question, that last one.

Mr. Flynn: No, my question was finished but the witness started to answer when he was interrupted.

Judge Denman: The objection is overruled.

A. I was about to say that the first grade teacher—and this is based on statements made to me about the work in the first grade—frequently has as one of her serious problems the building up of a vocabulary with the children so that they can carry on the work of the schools. We had ten to fifteen years ago and earlier a receiving grade, one [fol. 438] year of work prior to going into the first grade. That was abandoned later but the problem was still there and it is one of the reasons for the strong drive for kindergartens at public expense in Hawaii. We have had them now; they began four years ago and additional appropriations two years ago, and an additional appropriation this year for kindergartens for a year of instruction prior to going into the first grade.

Q. It has been found necessary, then, Doctor, that great stress be placed upon the English language of children in the first grade or just prior to the first grade?

Mr. Wirin: We object to that as leading and suggestive and as repetitious of the witness' testimony.

Mr. Flynn: We'll go on to the next question from it.

Mr. Wirin: I know, but I don't think that counsel should summarize the witness' testimony upon the question.

Judge McCormick: There isn't any jury to be prejudiced by a question of that kind here.

Mr. Wirin: I'll concede that. What I am trying to do, however, and I think I am justified, is to see to it that the witness gives some testimony rather then being led from one subject to another in which he merely repeats the summary of the testimony as anticipated for him by counsel. In other words, is there a serious and grave sifuation?

Judge Denman: In this particular case he has already [fol. 439] stated it and counsel is asking him again.

Mr. Wirin: Well, that's the evil, doubly.

Judge Denman: When the evil approaches the point of counsel testifying, not the witness, why we can take it up. Will you answer the question?

The Witness: May I have that?

(The reporter read the last question.)

A. Yes.

Q. Now, proceeding to the next line of inquiry, Dr. Loper, do you have an opinion as to whether the study of a foreign language by children in the first four grades of school has any harmful or disadvantageous effects upon such children?

Judge Denman: With reference to what, to English?

Mr. Flynn: First with reference to their progress in their English studies.

A. Keeping in mind that I am expressing merely an opinion, having never taught in those grades, and calling your attention to the problem of the teacher in teaching English, in getting the children to increase their eye-span as they read across the page, I would say yes, that there is in my opinion a possibility of and likelihood that a study of certain foreign languages in those years would interfere with the teaching of English reading and comprehension.

Judge Denman: Would that be true of Portuguese, for [fol. 440] instance?

The Witness: I would have no opinion on that. Perhaps I should be a little more specific. What I have reference to is the thing that has been mentioned earlier this morning, of the orientation on the page from left to right as contrasted with reading from top down and from right to left across the page, because in the teaching of small children to read the teachers study the number of fixations across the page made by the eyes in an effort to increase the eye-span and to avoid going back and repeating. And they make considerable, they place considerable emphasis on catching at one fixation as much as possible and having as few such stops across the page as possible. So it is my opinion that languages that are written in a different form on the page would interfere with the teaching of reading English, reading the English language.

Q. Now, the languages you have referred to we can be sure are Oriental languages?

A. Yes.

Q. Which have this different method of writing and reading, is that correct?

A. That's right.

Q. Now, in your supervisory principal work, Dr. Loper, have you had occasion to visit any foreign language schools in the Territory?

[fol. 441] A. Yes, I have visited Japanese language schools in Kona years ago, and Chinese language school here in Honolulu more recently.

Q. Now, from your observations in those instances did you find any differences or contrasts in the teaching methods or routines in the language schools differing from those in our existing schools?

Mr. Char: If your Honor please, I don't think this witness is an authority on Chinese or Japanese.

Mr. Flynn: I called for his observations, what he saw in the schools, your Honor.

Judge Denman: Well, I think you'd have to prove that he understood Chinese languages, wouldn't you, if you have difference of routine?

Mr. Flynn: I mean the physical routine that the party can observe in the teaching activities as distinguished from our own, and a person can observe those.

Judge Denman: Can a man who doesn't understand the language tell the difference in routine of teaching?

Mr. Flynn: What I want him to testify is to what he saw. Without understanding the language he can describe what he saw the teacher do or say what he saw the children do or say.

Judge Denman: What is the relevancy of that in your case?

[fol. 442] Mr. Flynn: We want to show, your Honor, that there are great differences existing as a result of which children of very tender years will be confused in trying to follow both the system there and what they are taught in our public schools. I think that is pertinent to this inquiry because the statute refers to the first four grades.

Judge Denman: What does the testimony propose to offer?

Mr. Flynn: The testimony will show that there are tremendous differences in the methods of teaching, and similarly, of course, in the methods of learning that the children

go through in the language schools at the same time that they are going through these contrasting methods in our public schools, as a result of which we intend to show that there are things causing confusion and mental disturbances to the children in those early years, as a result of which the law has been enacted trying to prohibit that for the first four grades.

Judge McCormick: You mean—to see if I apprehend just what you mean—you mean physical and mental techniques other than lingual, other than the language attitude of the teacher?

Mr. Flynn: Yes, your Honor, that's what I'm talking about.

Judge McCormick: I said "lingual". I meant language, oral, exclamatory.

Judge Denman: The objection is overruled.

[fol. 443] A. One of the most noticeable contrasts which would be noted by any well-trained public school teacher, and which I have witnessed, is that the group in the Oriental language schools at that time—the ones I visited—recite in unison, the whole room reading or reciting at one time. Now, that is pretty well—that has pretty well disappeared from the teaching methods in the public schools except for choral verse which is in a manner of recitation in unison for another purpose. But for the purpose of teaching reading—and this is not recent but at least it is, as early as my experience, professional experience, the emphasis has been on silent reading, or if oral, in small groups rather than the whole classroom at one time; reading for comprehension tested by a test which is frequently found in the reader itself or in the pamphlet that goes with it. So the contrast is in rote memorization apparently, or at least reading in unison or reciting in unison, the whole group of 35 or 40 youngsters at one time. I don't know whether that continued in recent years in the language schools just prior to the war or not, but that was the experience I found some 20 years ago, and again approximately 12 years ago in Honolulu.

Judge Denman: You described several things. You have here your character in Chinese. Now, characters make a sentence, we will say. What does the teacher do? Does he sing those or state those in Chinese, in the Chinese [fol. 444] language, as being what the character represents? Then the whole class repeats it?

The Witness: That was the impression I had; not knowing the language I couldn't be sure.

Judge Denman: Now, what else is there besides that? Now, that's teaching them to read by having the whole class instead of an individual repeat after the instructor explains what the characters mean, like "cat", and so on, when we learn our writing. But here is a line of characters and the instructor repeats them and then the whole class repeats them, is that it, and then repeats them and repeats them until it is a memory exercise as well as a learning of the sentence?

The Witness: Well, my acquaintance with it is too limited to answer your further question, Judge.

By Mr. Flynn:

Q. Now, Dr. Loper, from your experience in the field of education, do you have any opinion as to whether there will be any difference in the accomplishment, the successful accomplishment of a study of a foreign language beginning at the age of five or six as distinguished from the age of ten or eleven or twelve?

Mr. Char: You mean the foreign language?

Mr. Flynn: The foreign language.

Mr. Char: I object to that, if your Honor please. This [fol. 445] man is not an expert on Chinese or Japanese. He can't give an opinion along those lines. He didn't make any study of Chinese. No proper foundation has been made whether he is an expert on Chinese or any other foreign language.

Mr. Flynn: I asked him in the field of education generally, and teaching foreign languages comes within that.

Judge Denman: Your cross-examination can develop the particularization of his general statements. The objection is overruled.

A. In answer to your question, there was a study made some years ago by Professor Thorndyke on adult learning, and as I remember the results—I haven't reviewed them recently—his results were contrary to the common belief that adults do not learn as rapidly as children. In other words, the studies that he made indicated that adults could learn and do learn more rapidly than young people on the same kind of material. From that you asked my opinion. It would be my opinion that the language could be learned,

a foreign language could be learned as rapidly at a later age, as efficiently and effectively at a later age — at an early age.

Judge Denman: That is assuming the education of a lad went on from 15 to 23, including that period, he could learn a Chinese language somewhat better than he could up to 15?

The Witness: Possibly.

[fol. 446] Judge Denman: Have you ever contemplated the relative number of persons who have the time after 15 to acquire a foreign language?

The Witness: That, of course, is a different question.

By Mr. Flynn:

Q. Dr. Loper, are you familiar with this publication entitled "Community Survey of Education in Hawaii", printed in 1941?

A. Yes, I am acquainted with it and participated in the study, but perhaps don't know the details.

Q. You are familiar in a general way, then, with the results of the testing survey conducted under the direction of Richard E. Meyer, supervising principal of East Maui?

A. Yes.

Q. Referring to certain conclusions in this survey, it is stated that in our sixth grades the average accomplishment of the pupils is three-quarters of a year to a year and one-half behind that of mainland pupils in the same grade—

Mr. Wirin: Pardon me with respect to that. With respect to what is that? Does that indicate is it with respect to English?

Mr. Flynn: I am speaking now of the general intelligence quotient, general accomplishment.

Mr. Wirin: Intelligence quotient? Do you claim that there is a lower intelligence among the children here?

[fol. 447] Mr. Flynn: I am claiming there is a lower intelligence quotient.

Mr. Wirin: Let's hear it.

By Mr. Flynn:

Q. Does that concur with your own opinion throughout these years you have been with the Department of Public Instruction?

A. Yes, I have no other evidence to indicate that that is not correct.

Judge Denman: Well, have you had the experience on the mainland?

The Witness: No. As a matter of fact, I would have to go by the records that this work here was compared with. That is the test norms, tests standardized on the mainland and then used here. It would be on that basis, I believe, that that statement could be made.

Judge Denman: The character of the teachers, they are classified both to teach schools, let's say, the English standard schools and the others, as compared to the mainland?

Mr. Flynn: Yes. Well, I wouldn't make a very specific comparison to the mainland, your Honor. I do intend to bring out the requirements for admission to the profession of teaching here in the Territory.

Judge Denman: But here is an area where it is claimed that the pupils are deficient. It is perfectly obvious [fol. 448] that they may be deficient because of the character of instruction. They may be deficient in language because of deficiency of language of the teachers.

Mr. Flynn: I'll bring that out.

Judge Denman: It may be due to the prior training of the teachers. It may be that in certain classes of schools you have one class of teachers and another class of school like the English standard schools with another class of teachers. Now, to have weight on the statistics, we will hear that.

Mr. Flynn: Yes.

Q. Dr. Loper, do you have any opinion as to the cause or causes of this deficiency we have just mentioned?

A. Yes, I have opinions.

Q. What is your opinion?

A. Well, it is my opinion that it is in part related to the English handicap of children who come from homes that do not use good English. However, I should say that it may be related to any number of other factors. And it would require a careful research problem to know what those are.

Q. Do you have an opinion at this time as to what the other factors or some other factors might be?

A. No, I don't.

Q. Do you have an opinion as to whether that deficiency is due to any deficiency in our teachers' ability?

[fol. 449] A. It is possible.

Q. Can you express an opinion more specifically than that, if you have one?

A. We are dealing there with figures that were compiled in all schools in the Territory, and there is a considerable difference in the ability of teachers in various places. Our teachers in Hawaii are very highly selected, a very highly selected group, as they come to us from the University in recent years. It is true, however, that we still have in the department some who didn't have as much training as is now required.

Q. What training is now required for a teacher's certificate?

A. A college degree and a fifth year of training, not a Master's degree but a fifth year of training, which includes a certain prescribed number of hours in professional education. The fifth year being divided into two parts: one half of it in practical teaching or in cadet or intern teaching in the schools of the city under supervision.

Q. Now, can you give an estimate as to how long that requirement has been in force?

A. I would guess ten to twelve years, possibly longer.

Q. Can you tell us briefly what the requirements were prior to that time?

A. Prior to that they were required to have the degree, [fol. 450] that is, four years of college training.

Q. And for about how long was that requirement in force?

A. When I came to the Territory in 1921 that was the requirement, but just shortly before that the record shows that there was such a teacher shortage that some were employed who hadn't finished college.

Q. So for more than 25 years, then, our teachers have been required to obtain at least a college degree before they were admitted to teach?

A. I think that is a safe statement, yes.

Q. Now, in the work of training our teachers, is there any special emphasis placed on English here in the Territory as distinguished from mainland teachers' colleges?

A. I don't know about the mainland teachers' colleges. I know there is a very strong emphasis on English, and it comes in, of course, in the instruction of teachers, and not

only in the instruction of teachers but also in the selection of candidates to take the training.

Mr. Flynn: You may cross-examine.

Cross-examination.

By Mr. Wirin:

Q. Dr. Loper, do you have an opinion as to whether or not the attendance in the Islands of children in so-called foreign language schools, particularly Chinese and Japa- [fol. 451] nese, has been a factor in the retardation in English in the public schools which you have testified about?

A. Yes, it is my opinion that it is a factor.

Q. It is a factor? Do you know Mr. Oren E. Long?

A. Yes.

Q. Is he now the Acting Governor of the Islands?

A. Yes.

Q. Was he formerly Superintendent of Public Instruction?

A. Yes.

Q. Do you know generally about his testimony in connection with hearings before a subcommittee of the Committee on Territories of the House of Representatives, in connection with statehood for Hawaii, between October 7 and October 18, and did you give him a statement pertaining to the language schools for incorporation in the record of the hearings?

A. I am not familiar with his testimony but I recall a statement concerning a study, made by Professor Symonds, on the effect of foreign language schools on progress in the public schools, or especially with respect to English.

Q. Did you make a statement or give a statement for incorporation in the records in which you stated the popular opinion of a few years ago, "That the work of the language schools interfered with the teaching of English in the public schools is probably false"?

A. You are reading from the record? It is possible that [fol. 452] I made that statement.

Q. I will show you the document. Well, that statement is different from the statement which you made just a moment ago, namely, that it is your opinion now that the language schools have been a factor in the retardation of English in the public schools—that's true, isn't it, Doctor?

A. That was based on Professor Symonds' study which, as I recall, the record showed that the problem of teaching English was more seriously confused by the pidgin English of the street and the playground and the home than the teaching of the foreign language in the foreign language schools.

Q. Now, the testimony I am referring to was in October, 1935. In 1935, during this testimony, you accepted the Doctor Symonds report as a correct report, and you accepted the opinion of Dr. Symonds, did you not?

A. That's correct.

Q. And that opinion is to the effect that there is no perceptible relationship between language schools and attendance at language schools and any retardation of English or English studies or studies in the public schools, isn't that correct?

A. You said "no perceptible"?

Q. Yes.

Judge Denman: You are speaking of the report now?

A. Yes, I assume. My recollection of the report was [fol. 453] that he found the pidgin English of the street and playground a more serious problem than the attendance at language schools.

Q. Well, let me call this statement to your attention. I will read it to you. Let's see, in 1935 you were the supervising principal of the Honolulu schools?

A. That's right.

Q. And you were born in Iowa?

A. That's right.

Q. Did you furnish a statement to the committee which reads as follows:

> "It is my opinion that the foreign language schools of Hawaii are not un-American nor sponsored for nationalistic motives."?

A. That was my opinion at that time.

Q. It is still your opinion, is it not?

A. You are asking about whether they were nationalistic or not?

Q. Yes.

A. I have had occasion to wonder whether my opinion at that time was correct. I have no additional evidence.

Q. Well, as I go along and read this, if your present opinion is different from what it was expressed before a committee of the House of Representatives in 1936, you will interrupt me and so state, will you? And that will save time.

> "The desire that children shall know the language [fol. 454] of their parents is the real reason for their support."

Is that correct now in your present opinion?

A. I think that is correct, yes.

Q. You stated:

> "This opinion is based upon 10 years in the public schools of the Territory and some observation during that time of the foreign language schools."

A. That's right.

Q. As a matter of fact, your observation of the conduct of foreign language schools which you testified about on direct examination was prior to this testimony, was it not?

A. Well, with reference to the visiting in Kona, it was prior to it. But perhaps the Chinese language school here was after. I'm not sure.

Q. In 1936? When was your visit to the language school, Chinese language school?

A. That I don't know.

Q. Now, then, I read:

> "The popular opinion of a few years ago that the work of the language school interferes with the teaching of English in a public school is probably false."

Is that your present opinion?

A. No, it isn't.

Q. You have changed your opinion since 1936?

[fol. 455] A. Yes.

Q. Have you communicated your change of opinion to any agency of the Federal Government, particularly any Congressional committee investigating the matter of the nature of the population of the Islands, so far as the suitability of the Islands' population is for statehood?

A. No, I have had no occasion to do so.

Q. What has caused you to change your opinion?

A. My opinion at the present time concerning the possible confusion that comes to a child learning Chinese or Japanese is based on the emphasis that the public school teachers place on getting the child to read from the lefthand side of the page to the righthand side, and that emphasis has increased the speed of reading where teachers know how to use it.

Q. You knew that in 1936 when this statement was made before the House committee, didn't you?

A. No, I think I became acquainted with that in more recent years.

Q. Well, your visits to the Chinese, to the language schools, was at least—one of them—was prior to testifying before this committee?

A. Oh, you mean I knew of the manner of the Oriental languages?

Q. Yes.

[fol. 456] A. Yes, surely.

Q. You knew that all along?

A. Yes, surely.

Q. As a matter of fact, the Oriental language schools have not been in existence since 1941, isn't that true?

A. That's correct.

Q. And such testimony as you have given pertaining to the language schools pertains to your observations prior to 1941?

A. That's right.

Q. Well, now, you go on to say:

> "The only objective study of this problem which I have seen seems to strongly indicate that this is the case."

And then you cite the study by Professor Symonds. Is it still your opinion that that is the only objective authority, scientific study of the problem?

A. No, I haven't made any study of it myself but I am assuming that there may be other studies now.

Q. Do you know of any?

A. No, I can't name any.

Q. The only one that you know at the present time is Dr. Symonds' study?

A. That's right.

Q. Do you have the same opinion as to its authenticity

[fol. 457] now as you did in 1936 when you testified before the House committee, or have you changed your mind about that, Dr. Loper?

A. I think that there may be other factors that were not tested there.

Q. Did you know those factors when you gave your statement to the committee?

A. No; I am referring to things which may have come to our attention since.

Q. What things came to your attention since 1936?

A. Well, I mentioned the one concerning the method of primary teaching; the use of carefully prepared instruments for testing eye-span, for example, became quite popular in the Islands a few years ago. And that brought to our attention this problem of the child who repeats and lingers overlong on a certain phrase. The machine or instrument is arranged so that his time is limited on any particular phrase, and he must go on to the next phrase.

Q. When were those machines put into effect?

A. I can't give you the date.

Q. Approximately?

A. I suppose it was in the late 30s.

Q. The late 30s?

A. Yes.

Q. Soon, some time after your testimony?

[fol. 458] A. It would have been, yes.

Q. But you knew in 1936 generally about the nature of the manner of the teaching of Chinese in the Chinese language schools?

A. That part I knew.

Q. By rote and memory? You didn't call that to the attention of the committee, did you?

A. No, I did not.

Q. Now, do you now agree with the following conclusions of Dr. Symonds, which are reported in this report on page 82 of the hearings on H. R. 3034, as follows:

> "(a) That the influence of the home and the playground is about four times as great as that of the Chinese language schools in causing retardation in the English language."?

Do you now subscribe to that view of Dr. Symonds which you submitted to the committee?

A. Yes. I think that is certainly a greater influence, from the playground than from the language schools as such.

Q. Do you now agree with the following conclusion of Dr. Symonds which you gave to the committee:

> "(b) That for better English we should let the foreign language schools alone and turn our attention to the home, the playground, and the kind of individuals who are born."

[fol. 459] Do you agree to that?

A. I agree to the latter part of it; the implication that the language school is in no sense responsible, I would not now agree to.

Q. You do not now agree to the recommendation or conclusion of Dr. Symonds which you represented as your opinion and conclusion, that for better English the foreign language schools should be let alone?

A. That part I would not accept at the present time. The rest of that statement I would.

Q. Would you accept the following statement of Dr. Symonds which you gave to the committee:

> "(c) That correct speech has a worse enemy in the pidgin English of the home than in the Chinese language school"?

A. That I accept.

Q. Now, pidgin English is rather widespread in the Islands, is it not, is that true?

A. Yes.

Q. Pidgin English obtains in the homes of persons other than of Chinese descent, does it not?

A. Yes, I assume so.

Q. It obtains in the homes of Hawaiians, Portuguese, Puerto Ricans, none of whom attend, have attended language schools on the Islands?

[fol. 460] A. I have no personal experience on which to base that. My opinion would be Yes. I would assume that it exists there.

Q. Well, you have heard Portuguese children use pidgin English?

A. Oh, yes, certainly.

Q. You know that Portuguese children do not go to so-called foreign language schools?

A. That's right.

Q. Did you then make the following statement:

"I should expect to find the same results in connection with the Japanese language schools."?

A. That I did.

Q. And you meant by that, did you not, that you should expect to find that the Japanese language school was, so far as securing better English was concerned—should be let alone at that time? You meant that?

A. Yes.

Q. Since then you have changed your mind?

A. The study, as I recall Dr. Symonds' study, was made not of Japanese language schools but of Chinese language schools.

Q. Yes, but then you added your own views, that the conclusions of Dr. Symonds were with respect to Chinese language schools, which you accepted, and also applied to [fol. 461] the Japanese language schools?

A. That's correct.

Q. Now, do you know of Dr. A. L. Dean, formerly President of the University of Hawaii?

A. Yes.

Q. Do you consider him an authority upon education and educational problems in the Islands?

A. Yes, he was President of the University for many years and later Chairman of the School Board, the Department of Public Instruction.

Q. Do you or do you not now agree with the following opinions of Dr. Dean, as stated to the same House committee which I have been calling your attention to:

"With respect to the Japanese language schools, I am pretty well satisfied on the following: (a) They are not sponsored nor controlled by the Japanese Government."

Do you accept that? Is that your present opinion?

A. I would have accepted that at that time. I don't have any information but I do have a doubt in my mind at the present time concerning that matter.

Q. Well, I may want to get that little bit in. I just want to call that first. Do you agree with the following statement by Dr. Dean:

"The chief motives of the parents are: (1) Desire [fol. 462] that their children shall learn to read, write, and speak good Japanese and thus allow closer family ties."?

A. That I would accept.

Q. Secondly:

"Desire that their children be instructed in good manners and gain some appreciation of Japanese culture."

A. That I would accept.

Q. Third:

"Desire that the children be kept occupied and out of possible mischief outside regular school hours."

A. I would accept that as a possible motive of the parents, not as a valid educational principle.

Q. And further:

"(f) That education in the public schools is not interfered with."

Would you accept that?

A. No.

Judge Denman: Mr. Wirin, what are you reading from?

Mr. Wirin: I am reading—and we shall offer in evidence in due course——

Judge Denman: No, I mean whose testimony?

Mr. Wirin: That's the testimony of Dr. Dean, who was the President of the University of Hawaii.

[fol. 463] Judge Denman: You are asking whether he agrees with Dr. Dean's testimony at that time?

Mr. Wirin: Yes.

Judge Denman: Is there any concurrence of the testimony in the record of this gentleman?

Mr. Wirin: Oh, yes.

Judge Denman: Concurrence of Dr. Dean's testimony? You found concurrence in other matters, but in this thing is there anything in that testimony which shows the concurrence which you are seeking to interrogate him on?

Mr. Wirin: There is not any direct evidence of such concurrence. I mean by that, in the course of this testimony this witness did not accept the testimony of Dr. Dean, and hence I am asking him about it. But I think there was concurrence in points of view.

Judge Deman: You are really putting in Dr. Dean's testimony through a witness.

Mr. Wirin: Perhaps I am, but I feel I don't have to do that anyway. This is a matter of judicial notice in any event. And we also intend to offer, I understand without objection, these hearings. But by way of cross-examination I am trying to inquire as to whether or not this witness, who is an expert in the field, does or does not concur with other witnesses who also are admitted to be experts, at least by this witness.

[fol. 464] By Mr. Wirin:

Q. Do you know of Dr. William H. George, Dean of the College of Arts and Sciences, University of Hawaii?

A. Yes.

Q. Do you consider him to be an expert in the general field of educational problems on the Islands?

A. If you mean by an expert in the field of education, the field of public education prior to the first 12 grades, I doubt that he would be an expert or claim to be. I know him as a University professor. I have taken a course or two with him and he would be informed, of course, in the general field of University education.

Q. You don't think he'd be as well-informed as you on the problem of Japanese or foreign language schools, do you, Doctor?

A. I don't know about that. He may have made a study of that at the University. I am not aware of it.

Q. Are you familiar with the fact that his statement before the committee, made at the same time as your statement was submitted, recited the following:

> "In regard to the propriety of Japanese language schools in Hawaii, I am convinced that they do not constitute a menace; rather, they are a benefit to our community"?

Let me ask you first whether or not in 1936 you accepted that [fol. 465] view as your view?

A. You are asking me whether I was familiar with this?

Q. Whether that was your view in 1936, similar to the views which you gave to the committee in accepting Dr. Symonds' report?

Mr. Flynn: We will object to this question, your Honor. He talked about a menace or benefit. I don't think it is concerned with languages as our law is, or that it has anything to do with the direct examination.

Judge Denman: The objection will be sustained.

By Mr. Wirin:

Q. Do you know E. V. Sayers, Director of the School of Elementary Education, University of Hawaii?

A. Yes.

Q. Do you consider him an expert in the field of elementary education?

A. His field is the training of teachers for the public elementary schools and secondary schools.

Q. Are you familiar with his testimony before the committee, which I will read very briefly:

> "I came to see them—(Referring to language schools)—as stabilizing factors because of the service they rendered youth that were in danger of losing the social benefits of home and family influence before they had sufficiently accepted the customs and the institutions [fol. 466] of the American community in which they were growing up."?

Are you familiar with that view?

Mr. Flynn: Object to it on the same grounds as before.

Mr. Wirin: I submit, your Honor, that it is a proper subject for cross-examination, to ascertain whether he accepts the views of other experts in the field. On direct examination he was asked by counsel whether he accepted the view of a certain committee that had published a certain report upon the general subject matter.

Mr. Flynn: I don't think this is concerned with what was testified to on direct examination, your Honor.

Judge Denman: Will you repeat that?

Mr. Flynn: I don't agree that this concerns it, that this concerns what was testified to on direct examination. We were speaking specifically of English deficiency in schools

and referring specifically to the study of languages. We are now discussing sociological aspects of it, which were not brought out in any way on direct examination.

Judge Denman: The objection will be sustained.

By Mr. Wirin:

Q. Now, Dr. Loper, what does the phrase "5.0" as a test score with respect to standard tests in composition and in reading mean in educational circles?

A. It means——.

[fol. 467] Mr. Flynn: I'm going to make an objection, your Honor. The question of "5.0" was not on direct examination. I see that it's in the statute, but this witness has not been questioned on that section of the statute.

Mr. Wirin: Well, this is on cross-examination. He was asked to define what is a standard test. The subject is a little bit different.

Judge Denman: Your direct was on standard tests. Here is one kind.

Mr. Flynn: Very well, your Honor.

Judge Denman: Overruled.

A. The score "5.0" means the average mark made by thousands of children taking the test in the process of standardizing it, who were in the first month of the fifth grade, or rather perhaps it is the last month of the fourth grade. It is at that point of moving from fourth grade to fifth grade, the average mark made becomes the grade score or norm, and 51 percent means the average for the first month, 52 the second month, in the fifth year.

Judge Denman: What do the numbers midway between one and ten mean?

A. The school year is somewhat less than ten months but it follows that percent for the months during the year on a grade norm.

Q. Now, in your school system, do you have a test which [fol. 468] you call a standard test, or whatever you may call it, which is a test that has been generally recognized by educators?

A. The answer is No, if you say a test. We have many.

Q. Do you have many tests that have been generally recognized by educators?

A. Oh, yes.

Q. What do these tests consist of?

A. I'd like to ask that you bring someone who can testify more adequately, but in general there are various types of tests, tests that measure achievement or progress in various subject matters; other tests that purport to be measures of native intelligence, and still others that measure aptitude for various vocations, for vocational guidance purposes, etc., all of which are standardized in the manner that has been explained.

Q. Now, with respect to the matter of the ability to read and compose English, what is the practice so far as giving those standard tests is concerned to the children?

A. As I explained, the tests in recent years have been given to the twelfth grade, the ninth grade, the sixth grade, and I think during the past year the third grade. In all or many schools throughout the Territory that was done. In addition to that, standardized tests are given in any or all classes by the teacher with the help of the principal, [fol. 469] and the direct test measure, the research director in the Department of Public Instruction.

Q. Now, let us take a specific situation of a child that is in the fifth grade and desires to attend a foreign language school. Am I correct in my understanding that the present practice is that if that child passes, receives a passing grade given to that child by his or her teacher in English, that then that child is considered as admissible to attend a language school?

A. I think that is what would be done. I don't know that any are attending language schools. There are none. But I mean if you are asking how would we interpret that, as I understand it, if he has passed from the fourth grade into the fifth grade and wishes to attend language school, he may do so.

Q. Well, now, that isn't quite accurate, is it? Suppose he passes from the fourth to the fifth grade but does not pass English, he hasn't met the requirement as the department has construed it of the statute, for a language statute, has he?

A. I would have to read the statute a little more carefully.

Q. Well, in the questioning by Judge Denman I understood you to testify that the standard which is used by the

public school system in ascertaining whether or not a child [fol. 470] may attend a language school is whether or not that child has passed studies in English, isn't that correct?

A. The standard by which you would pass from the fourth grade to the fifth grade.

Q. Well, let me put it this way: Suppose you have a child that is extraordinarily proficient in mathematics, arithmetic, and every other subject except English, and does not receive a passing grade in English, that child would be promoted ordinarily, would it not?

A. That statement would have been true, might possibly have been true some years ago. But during recent years, and I think it was related to the "Speak American" campaign in the community, the Department of Public Instruction adopted a policy of not promoting if the child did not make a passing grade in English. So that if he, if such a thing could happen that he made excellent marks in everything else but failed in his English, he would not be promoted under that policy.

Judge Denman: Is that the present policy?

The Witness: That has not been changed. That originated during the war, and your question then would be answered in the affirmative. It is still the policy.

Judge Denman: Well, then, that is a martial and not a pedagogical requirement?

The Witness: It is. It is under study and consideration. [fol. 471] It was brought up during the first part of the school year just passed and is being studied by teachers. And no final action which would change that has been taken by the Commissioner.

Judge Denman: So this statute was enacted during the period in which that English campaign was on.

The Witness: I don't know exactly the dates. I was out of the school department for four years. But it was during the war, I'm sure of that.

Judge Denman: During the war. So that during the pressure of the war and the attendant psychological changes in the community you went from a pedagogical to a martial administration of the study of the English language, isn't that manifest?

The Witness: I guess so.

By Mr. Wirin:

Q. Well, now, Doctor, in determining whether or not the child shall be promoted say from the fifth and sixth grade, the teacher of the child essentially makes or substantially makes the final decision?

A. That is correct.

Q. And in determining whether or not the child shall receive a passing grade in English, which will determine under your present practice whether or not the child shall be promoted, the teacher makes the final decision?

[fol. 472] A. That's correct.

Q. And the teacher makes that decision from general observation of the child and takes into consideration what he thought of the child and the results which the child achieves in terms of grade, isn't that true?

A. Yes, supplemented by the standardized tests which may have been given during the year and the less formal tests which she herself prepares and gives.

Q. Now, you say the standardized test which may have been given during the year. As I understand it, the standardized tests have not been given to a child, say, in the fifth grade. The test is given in the twelfth, maybe the sixth, third, not the fifth?

A. That needs clarification. The tests that I referred to as being given in the sixth and ninth and twelfth are the same tests given in many schools of the Territory, if not all schools of the Territory. The other—you asked about the standardized tests which might have been given in the fifth grade?

Q. I'm talking about tests in English composition and English.

A. Yes. The statement that it is not given in the fifth grade would not be true. To give any accurate picture of just which tests were given during any particular period of time would require a study, a survey, or ask the director [fol. 473] of tests and measurements which schools and which classes have requested his advice concerning which tests to use for any particular purpose.

Q. All right, then, therefore a teacher in determining whether or not a child should be promoted and receive a passing grade in English, would take into consideration such tests as may have been given, and then the teacher's own opinion in the matter concerning the child——

A. That's correct.

Q. And would make his or her decision based upon that?

A. That's right.

Q. So that if, purely by way of hypothesis, a particular teacher did not like a particular child because of the race of that child, in that particular situation at least, which is purely hypothetical, the teacher, that teacher, would make the final decision none the less as to whether or not that child should receive a passing grade and hence should be permitted to attend a language school?

Mr. Flynn: I object to the question, your Honor. There is no basis for a hypothetical question of that kind.

Judge Denman: The objection will be sustained. In every profession, and in courts as elsewhere, prejudice exists. That's the reason why judges are disqualified. But you can't assume that it is the norm in the community.

Q. Now, with respect to the matter of English deficiency [fol. 474] in the schools, is it your opinion that *that* English deficiency is pretty general, no matter the race of the children?

A. Well, to answer that in the affirmative would be wrong because it happens that certain races also happen to use the English language at home. Now, if you wish to restate the question, we might get at it more accurately.

Q. Yes. In other words, the extent and the nature of the English deficiency of the child that goes to school depends upon the nature of the English which is spoken at the home of the child?

A. That among other things.

Q. Have you found deficiency in English among children of Hawaiian, Puerto Rican, Portuguese, of Hawaiian-Portuguese parents?

A. Well, I personally haven't, but I am assuming the condition exists. I am quite sure that the records would show that there are deficiencies in English among some of the children of those races, yes.

Q. And that is because the language which is spoken at the homes of those children is not pure or standard English?

A. That is one of the factors.

Q. What are the other factors?

A. There may be many.

Q. And that is true whether or not it is Hawaiian or [fol. 475] Portuguese or Puerto Rican children that do or do not go to a language school, isn't it?

A. That is true.

Q. In other words, you do not now attribute the language deficiency of children in the public schools who come from homes where pure English is not spoken solely to the existence of language schools, do you?

A. No, I do not, not solely.

Q. Or largely to the existence of language schools, do you?

A. I'd like to make a distinction there between the written, the reading of English and the oral part of it.

Q. Well, do.

A. I should say that there might be—this is merely opinion—a greater problem coming out of pidgin English or the use of more than one language in oral English from the home, the playground, than in the language school. I think that there may be a more serious problem from the standpoint of language schools in the teaching of reading in the English language.

Q. There have been no scientific studies made on that particular subject?

A. Not that I know of.

Q. Now, with respect to the teachers in Hawaii, or some of the older teachers, teachers who have acquired some [fol. 476] proficiency in pidgin English?

A. I don't know about that.

Q. What has been your observation about it?

A. I have never heard teachers use pidgin English.

Q. Well, you say that in the University in training teachers you made a sort of, you emphasized the study of English?

A. That is true.

Q. Well, isn't that true because of the prevalence even among prospective teachers of pidgin English?

A. Well, I am not sure that I understand what you mean by pidgin English. What I meant by the emphasis on English in the selection and training of teachers at the University was this, that in the process they are highly selected to start with before they are admitted to the beginning year of teacher training.

Q. May I interrupt you? Are they selected with a view of their being able to speak, enunciate standard English?

A. That's right.

Q. More correctly?

A. That among other things, of course.

Q. Because, as I understand, that in the schools you are trying to develop and maintain a high standard in the type of English which is spoken and written?

A. That's correct. Keep in mind that I am not at the [fol. 477] University. I haven't participated in any teachers' training work except a few courses some years ago, but I do know that they are highly selected from the standpoint of their ability to speak and enunciate, pronounce English, use it grammatically, and also from the standpoint of general intelligence and personality. And as the process goes on, they are still further highly selected, so that they come out very well prepared indeed for their job.

Q. Yes, I am not questioning that. But what I want to know is this, whether or not one of the reasons for attempting to maintain a high selectivity among teachers so far as their proficiency in English is concerned is not due to the general prevalence in the community of an English short of standard English, commonly known as pidgin English?

A. I suppose that might be true.

Q. And, of course, the fact that there is a widespread pidgin English in the community, as you have testified, reflects itself in the problem of teaching pure English or standard English to children in the schools, isn't that correct? And you would agree, would you not, that by far the larger factor in the retardation of children so far as acquiring English in speech and in composition is due to the prevalence of pidgin English?

A. I agreed with the Symonds study in '36, and I have no reason to disagree with that point now. I have admitted [fol. 478] it here, that probably the larger factor is the pidgin English.

Q. And that is true as to Puerto Rican, Hawaiian, Portuguese, and other children who do not attend language schools, the same as it is true of Chinese, Japanese, and perhaps some Korean children who have attended language schools, isn't that so, so far as pidgin English being the major factor?

A. Oh, so far as that is concerned, yes. If there is another factor, as I think there is, they would have the additional handicap growing out of the study of the foreign language.

Q. Now, you say they would have an additional handicap. You mean by that an additional handicap in learning English composition and English reading?

A. Specially reading.

Q. Now, as an educator, do you consider the sole goal of the educational system on the Islands that of teaching children proficiency in English reading?

A. Certainly not. However, it is closely related to many other aims of education.

Q. You would agree, would you not, that the primary aim of education is to build good citizens, wouldn't you?

A. I would not deny that. I would accept that. A primary purpose certainly it is.

Q. Isn't it sort of the primary purpose to build persons [fol. 479] or personalities that make for good citizenship and persons who are good citizens?

A. It is a good definition.

Q. That is the purpose of education?

A. That's right.

Q. Without going into details for the moment, has it not been demonstrated during the last war that the attendance of graduates of the public schools of Hawaii in their contribution to the war have been equally good citizens no matter their race and no matter their attendance in any language schools?

A. My opinion——

Mr. Flynn: We will object to the question as immaterial. I will even stipulate that is correct, if it will help save time.

Judge Denman: You've got your stipulation.

Mr. Wirin: The stipulation covers it.

Q. Now, I think this is not quite the same question—do you and does your educational system here recognize that this entire nation is composed of a heterogeneous people?

A. Yes.

Q. Which people speak different languages?

A. Yes.

Q. And that generally the ability to speak English or any other language is not the sole criterion for good citizenship?

[fol. 480] Mr. Flynn: I am going to object again, your Honor. I think it is immaterial.

Mr. Wirin: Well, your Honor, I think it is material, unless we get a stipulation.

Judge Denman: You mean English is not the sole criterion of citizenship?

Mr. Flynn: I'll stipulate to that, your Honor.

By Mr. Wirin:

Q. I think you made some statement about lower intelligence quotient, and I am not too familiar with the article, but let me ask you this question about it: Do you consider that such lower intelligence or lower intelligence quotient as there may be, and as there may have been among the children in the schools of Hawaii, affect their citizenship sufficiently to affect the matter of Hawaii becoming a state in the union?

A. Your question implies that there is a lower intelligence among the children here than on the mainland?

Q. Yes. I thought you so testified.

A. I don't recall that.

Mr. Flynn: The question that I asked on direct examination referred only to the intelligence quotient results shown by the test.

By Mr. Wirin:

Q. Insofar as there is a difference, if any, in intelligence quotient or quotients between the children of Hawaii having [fol. 481] attended a Hawaiian school and the children on the mainland, do you think that difference is sufficient to affect the matter of the qualifications of the graduates of the public schools of Hawaii for citizenship in connection with the matter of Hawaii becoming a state of the Union?

Judge Denman: What is the relevancy of that?

Mr. Wirin: Well, I think——

Judge Denman: We are getting far afield, and I want to see the boundary lines that you have in mind.

Mr. Wirin: In the last question I was asking of an expert witness in the field of education—we propose to argue that the matter of the facility of speaking English is not the kind of a problem or evil which the Territory could meet by this kind of a statute. And if this witness admits that there are other functions of education which are more paramount, which are not affected by language schools, we think we have a basis for a fairly strong argument when that time for argument comes.

Judge Denman: But you talk about admission of a state.

Mr. Wirin: Yes.

Judge Denman: Admission to statehood. You are getting far afield from your pedagogical question.

Mr. Wirin: Your Honor, if, as I understand the position taken by many Hawaiians, that there is nothing in the educational system on the one hand, nor in the character of [fol. 482] the population on the other, which in any way disqualifies the inhabitants and citizens of this community from being members of a state in the Union——

Judge Denman: What has that got to do with the pedagogical question here? The affect on the mind of a child in school in the afternoon, that diverts a certain amount of his attention and mental powers—now, what has statehood got to do with that?

Mr. Wirin: Well, I am trying to point it out this way, your Honor——

Judge Denman: Are you trying to tie it in to some testimony that somebody has given regarding statehood?

Mr. Wirin: Indeed I am. I am trying to tie it in with this witness regarding statehood, because this witness gave testimony somewhat contrary to his previous testimony urging statehood on the grounds that there is nothing on the Islands which interfered with granting statehood and the full rights of citizenship to the Islands and its inhabitants.

Mr. Flynn: If the Court please, I think that is a matter on cross-examination; it has nothing to do with direct. All this testimony that was brought out so far was on cross-examination.

Judge Denman: What is the question?

(The reporter read the last question.)

Mr. Flynn: I'll make an objection to the question as in-[fol. 483] competent.

Judge McCormick: Of course, Mr. Wirin, I think that it is relevant insofar as the testimony of the witness on the stand was given before the legislative committee, but I don't know just how far we should go into this, what appears to me to be highly controverted and extrinsic to the issue of statehood.

Mr. Wirin: Oh, your Honor, I agree that that issue is not at all a direct issue in this case. But a witness having testified on one occasion that the language schools in no way affected the qualifications of the Hawaiian population

for citizenship and hence for statehood, I thought it was legitimate for me to inquire now by way of my last question whether such testimony as he has given here——

Judge Denman: I understand this would be the last question. I think we will overrule the objection.

A. If I remember the question correctly, certainly not. The difference, if any, in intelligence would not in any way detract. And I'd like to add two other comments, if I may. First of all, I do not assume that there is a difference in native intelligence, even though the intelligence quotient may reveal it. And that in turn is related to language, because many of the tests that are used to measure intelligence are in a sense language tests. And by improving English they make a higher score. And the second point is, [fol. 484] that I don't know that there is any correlation between high intelligence and good citizenship.

Q. And you also say that there is no necessary relationsip between a proficiency in reading English and good citizenship?

A. I can't say that because we do need to know how to read to be good citizens.

Judge Denman: Well, is he speaking of reading a newspaper or the Constitution? You can tell instantly on the Constitution whether a person ought to be a good citizen. But let me ask you, suppose a man can read the newspapers intelligently, read a book intelligently, of simple character, would you say that for purposes of citizenship a higher knowledge of English is required?

The Witness: Not necessarily. He can be a very good citizen with that kind of ability to read.

Q. Once he meets the elementary requirements of being able to communicate intelligently in a community in which most persons speak the English language, that's correct, isn't it?

A. Yes.

Judge McCormick: Doctor, I'd like to ask a question about this term "intelligence quotient." What value has it if it isn't an added measurement of the intelligence of the student body?

[fol. 485] The Witness: I didn't mean to imply that it didn't measure at all. But we do have to keep in mind that some of the tests that purport to measure intelligence de-

pend upon language. And if there is a serious language deficiency so that the child taking the test doesn't understand, then the score would be lower than his true native intelligence should be.

Judge McCormick: I understand.

By Mr. Wirin:

Q. That would be true, would it not, of an immigrant Jewish boy in New York City, equal to a Chinese child in the Islands, is that correct?

A. I think so.

Q. It would also be true of a German boy in Nebraska whose parents spoke German and who lived in a family where German was spoken, a family consisting of German immigrants?

A. Yes, to the extent that the test used is also a language test. There are some tests that measure intelligence without dependence on the language to any great extent.

Q. So that the tests which you have been testifying about which have been given to the children in Hawaii, having been in English, being given to children who come from immigrant parents in a community where there is a large amount of pidgin English, necessarily meant that the children who come from immigrant families and who are in [fol. 486] places where pidgin English is spoken extensively, get a lower intelligence quotient than they would get if standard English were used?

A. You stated it more positively than I would. I would say there is that possibility, and we always have to be aware of the possibility and make corrections for it.

Q. And, as I understand it, that would apply to the mainlanders here and would apply to the situations in communities on the mainland where there is a large proportion of the population that is immigrant or recent immigrant, recent immigrant extraction?

A. It would apply to any group of school students where there is a deficiency in understanding English for any reason, I should say.

Mr. Wirin: That's all.

Mr. Flynn: One question, your Honor.

Redirect examination.

By Mr. Flynn:

Q. Dr. Loper, you have referred to the existing policy of our Department of Public Instruction under which a child will not be passed from grade to grade unless he has passing grades in English. As a practical matter, can you even conceive of a situation where there would be a child with high marks in everything else and a failing grade in English?

A. I would say that is probably a very remote possibility. [fol. 487] There is such a close connection between their understanding in the use of English and the marks they make in their other subjects that it would not be likely to happen.

Mr. Flynn: Thank you. No further questions.

Judge Metzger: Doctor, this pidgin English right from its inception takes on some slang phrases, doesn't it?

The Witness: Yes.

Judge Metzger: And it is true that the slang incorporated in it progresses with the education of the pupil until it reaches its height in the University?

The Witness: I am not qualified to answer that question.

Judge Metzger: Up to the high school, then?

The Witness: Your question is, does the informal or slang expression tend to accumulate in the speech, vocabulary of the speech as he grows older?

Judge Metzger: Yes. So that what is known as pidgin English in the high school, if you are not familiar with the University, is really a different pidgin English from that in the lower grades or classes in school, is that so?

The Witness: I'm afraid I can't answer that. It's possible that there is some such trend. It is also true that as they pass along through the grades of the elementary and secondary school, there is a very marked difference in the amount of progress in English made by different students, depending upon a number of factors, which is, how much [fol. 488] they care about acquiring proficiency in English. Some of the graduates of the high schools use faultless English and others who have gone through the same courses make the typical pidgin English errors in pronunciation.

Judge Metzger: Well, what I was trying to draw out is this: Pidgin English isn't any standardized language, is it?

The Witness: No. I am not qualified to speak. There are others who made a study of it. But I assume that the answer is No, it is not.

Judge Metzger: So that one hardly knows just what kind of language is meant by pidgin English, is that right?

The Witness: Yes, except that in the Islands it takes on enough of a consistency in form, I am told, so that the man who doesn't use it is handicapped in giving directions to those who do, or at least that used to be true on the plantations, that the foreman or luna was proficient in the use of the typical pidgin English in Hawaii and he was better able to give instructions to those who understood nothing else.

Judge Metzger: There are different dialects, though, are there not? There would be a plantation dialect and other industrial machine shop dialects?

The Witness: Yes. And I presume there are dialects based on the foreign language that is the mother tongue, the mother tongue of the immigrant to Hawaii; some slight [fol. 489] difference presumably.

Judge Denman: Have you ever heard of the investigation of the current social vocabulary on the campus of the University of California? There is some limitation of 300 words in which one slang phrase had 20 meanings by inflection.

The Witness: I have seen a reference to that, but I haven't read it.

Judge Denman: I presume in a sense that is the same thing as pidgin here. Of course, the pidgin of Shanghai and of San Francisco and Hawaii, being of Chinese, is very much alike. Has anybody made a study of that?

The Witness: I think Dr. Reinecke who was here has made as much of a study of that as anyone in the Territory.

Mr. Flynn: No further questions, your Honor.

Mr. Wirin: No questions.

Mr. Flynn: Thank you, Dr. Loper.

(Witness excused.)

Mr. Flynn: I would like to call my next witness, your Honor, but I am very much concerned, though, as to whether we can dispose of his testimony or most of it within the short time before the noon recess.

Judge Denman: We will recess until half past one.

(The Court recessed at 11:52 o'clock a. m.)

[fol. 490] Afternoon Session

Mr. Flynn: If your Honor please, counsel has requested that Dr. Loper be recalled for brief additional questioning, which is agreeable to me.

Mr. Wirin: Dr. Loper, please.

W. Harold Loper, a witness in behalf of the Defendants, having previously been sworn, resumed and testified further as follows:

Recross examination.

By Mr. Wirin:

Q. With respect to the difference, if any, between the English standard schools and the general public schools, are the teachers who are selected to teach in the standard English schools expected to have a comparatively higher proficiency in English?

A. No, there are good teachers and good schools. There are teachers that are not so good in both types of schools.

Q. Isn't an effort made, so far as teachers who will teach the children in the English standard schools, who presumably are more efficient in English—aren't the teachers selected with a view to teaching children who are more proficient in English?

A. The selection of teachers for English standard schools depends rather on their interest in requesting transfer from the job they have to such an assignment. And it might be argued that the problem of teaching English there is less [fol. 491] than in the other schools because the children come better grounded in it.

Q. Now, as a matter of actual fact, is it true that generally more English is spoken and more English is spoken fluently in the English standard schools than in the regular schools?

A. I would assume that the answer there is Yes.

Q. So that as a matter of actual practice those children who do not speak English as proficiently as those who are admissible and admitted into the English standard schools do not, so far as school attendance is concerned, have the benefit of associating in school with those children who are more proficient in the speaking and understanding of English?

Mr. Flynn: I object to the question. I don't think the inquiry so far has been strictly material, but I think this particular question is definitely immaterial.

Judge Denman: Isn't this material to the issue that has been raised here with respect to the effect on children of the language school affecting the proficiency in English? Now, if it be true that there would be a segregation of this character, wouldn't it be relevant to the inquiry which you directed your direct examination to, as to what happens to the two different classes of children, whether there is a greater proficiency in English in the one school over the [fol. 492] other? Would it have to do with what the effect of a language school would have on one over the other?

Mr. Flynn: Well, in that respect I am willing to let the question go. I don't think he is reaching that.

Judge Denman: If you had the complete segregation, for instance, of the English speaking children and the other children, the other children would not learn the language as rapidly, and elsewhere in the association, as they would if they were to intermingle with the English speaking children. Now, there is a partial segregation. Doesn't that seem to have a relevancy?

Mr. Flynn: I think possibly what I had in mind—and I'm somewhat worried about it, your Honor, and I might be anticipating—is that counsel is going to lead to some criticism of our English standard schools. I don't think it is relevant at all.

Mr. Wirin: That's not my purpose. It's a fact in the picture.

Judge Denman: The objection is withdrawn?

Mr. Flynn: I would accept that.

By Mr. Wirin:

Q. Will you answer the question?

A. Your question is, as I recall it, wouldn't the children in the English standard school hear more good English and by that method have a better opportunity to improve [fol. 493] their own English? I think the answer is Yes, that is necessarily implied in the segregation because they must pass a test to get into those schools.

Q. My question was really the converse of what you have been testifying to. And that is not so much as to whether the children who go to the English standard schools here hear more English, as it is as to whether or not those who

do not go to the English standard schools but go to the regular schools hear less English by virtue of having no contact during the school hours with those children in the community who are more proficient. That would be true, wouldn't it?

A. I would say Yes, except that in the classrooms the teachers, of course, use English and insist upon good English from the children. And there is a consistent effort to get them to use good English on the playground as well. But I would certainly expect that those who do not go to the English standard schools perhaps hear somewhat less good English used on the playground and on the streets, associating with those who have not taken or passed the test. You should keep in mind, however, that our records show that many students in the regular schools could pass the test and have taken tests that indicate that they could get into the English standard schools but do not choose to go there.

Q. But in any event, no one could go to the English stand-
[fol. 494] ard schools unless the test is passed?

A. That's correct.

Q. All right. Now, is it a fact that in the English standard schools generally the proportion of children of haole families is greater than the proportion in the non-English standard schools, in the regular schools?

A. I think that is true. As I recall the figures ten or fifteen years ago there was a preponderance of haole; than in a decade or somewhat less than that, the proportions were roughly 50-50, that is, somewhere between 40 to 60 percent. In recent years it is much less, that is, the Anglo-Saxon or haole group in the English standard schools had dropped to below 25 percent, in some cases to 20 percent.

Q. You say Anglo-Saxon or haole. Are those two terms interchangeable? Is a Portuguese person considered a haole, a white person?

A. Let me correct my statement and use the term "haole".

Q. I'm just a stranger here so I'm feeling my way around.

A. We limit it to those who hear English at home. Perhaps that would be a better way to answer your question.

Q. That is, you limit the phrase to persons who hear English at home?

A. No. I was asking if we could change the question to read that way, because I

[fol. 395] Q. You will have to change your answer or make your answer to comply with my question, if you will.

Judge Denman: What is the question?

Q. My question is this: You talked about haole children going to the English standard schools. Would attendance at the English standard schools include Portuguese children, and aren't they haole children?

A. Certainly they are in the English standard schools.

Q. Well, all right.

Judge McCormick: I'd like to have you develop that for my own benefit, what the term "haole" means. I heard it used and yet I don't know what it means.

Mr. Wirin: I shall be glad to do that.

Mr. Flynn: If your Honor please, could I stipulate to something and maybe save some time for the Court? We have witnesses that are in a hurry to get away also.

Judge McCormick: If you could agree on it. I don't care how you do it, but I'd like to know what the term means. I don't like to listen to terms and have no understanding as to their significance.

Judge Metzger: I suggest that Mr. Flynn be allowed to make the definition, and if I think that is right I will advise the other members of the Court that that is a sufficient definition.

Mr. Flynn: I was going to say that in the general parlance [fol. 496] of our Islands the term "haole" means white person. Now, for several decades in the matter of taking the census, there has been considerable dispute as to whether the Portuguese group come within the classification of haole. As of 1940 they were so included. The reason for that is that some Portuguese immigrants, dating back to the 1850s, came from the southern or African coast islands owned by Portugal, and therefore were colored persons or of some part-negro ancestry. As the extreme majority now are of pure white ancestry, and as a result of several prominent Portuguese resenting the implication when they were classified separately by the U. S. Bureau of the Census in 1910, '20 and '30, in 1940 it was changed. But in the general accepted understanding of the majority of the island people, Portuguese, although predominantly white in their ancestry, are frequently referred to as another racial group, as are Hawaiians or Japanese or Chinese, Puerto Ricans.

Judge Denman: Now, what do you stipulate they are for the purposes of this trial? Are Portuguese people painted by the Government not to be white?

Mr. Flynn: No, they are now all accepted as white, even though in some instances there are Portuguese of almost pure negro ancestry. The local Portuguese specify them and refer to them as the dark Portuguese. I think they are from Madeiras Islands or rather the Cape Verdes Islands [fol. 497] rather than the Azores or Madeiras.

Mr. Wirin: I accept that statement. I just want to say this in passing: Apparently the situation here is similar to what it is on the mainland; there are many persons who think that Mexicans are not white because the color of their skin is a little darker.

Judge Denman: In my school days 80 percent of Mexico was Mongoloid, Indian, on which there was a European, largely Spanish, overlay. It was in trials in California that it was to be regarded that they should not be treated as of the white race. Now, many Mexicans that I know of prominence are very proud of their Eurasian combination of blood.

Mr. Wirin: Apparently that is true of the Portuguese here. Now, I'd like to ask a question or two, since that is cleared up.

Q. When you talked about the haole attending at the English speaking schools, you were referring primarily, were you not, so I understand, to the children that come from English speaking families, and you were not referring to children that come from the Portuguese families, am I right about that?

A. I think that is correct. A more accurate statement of the thing would be that my attention was called to figures, a trend concerning, affecting the children of Oriental ancestry, Chinese, Japanese, Korean, and that whereas they [fol. 498] formerly were very much in the minority, they have become the majority in the English school enrollment. By implication the Portuguese would be in the other group.

Q. Now, in connection with attendance in the regular school, what proportion of the children in the regular schools would you say were haole children in the sense of children that come from English speaking homes?

A. Quite a small percentage.

Q. About four or five percent?

A. I presume that would be about right.

Q. So that the fact is that the children who come from non-English speaking homes in attending the public schools, the regular public schools, have the benefit of coming in daily contact with children who come from good English speaking homes to the extent of five percent?

A. Yes, of course that five percent is a mere estimate. Certainly less than in the English standard schools.

Q. Would you say it was very substantially less?

A. Oh, yes. I think that if we did not have English standard schools the percentage of children who came from homes using good English would certainly be upwards of 15, 20 percent.

Q. Let me just ask you this question now as an educator, and then I want to ask you some questions about another subject. Do you agree as an educator that if there were [fol. 499] no segregation, and if the children from English speaking homes attended the same schools and came into continuous contact during the play periods, rest periods, as well as other school hours, with children from non-English speaking homes, that that would tend to improve the understandability and the speakability of English by the children from the non-English speaking homes?

A. Let's see if I understand your question, that if there were no segregation, would not the good English of the few help improve the English of the many?

Q. Yes.

A. I am inclined to doubt that, because the problem of teaching good English in the secondary schools includes not only the work in the classroom but a drive promoting the idea of using good English in their informal experiences around the school, on the playground, etc. And that a very serious effort, to be specific, some 15 years ago, turned out to be very unpopular because those who knew how to use good English felt that they shouldn't because they would be in a sense showing off before those who do not habitually use good English.

Q. You mean that those who use good English would prefer not to associate with those who used poor English in the schools because it would appear they were showing off?

A. No, I didn't quite say that. I said that those in an [fol. 500] effort, in the effort to get a school group, student body concerned about improving their English and therefore using good English on the playground, with no one

supervising them, there was a tendency to use English not so good, or pidgin, because it was the popular thing to do.

Q. Well, all right. But let me ask you this: Let's assume that in the first four grades, don't you agree that if children were not segregated and children from English speaking homes, from English speaking families, went to the same schools as children from non-English speaking families, and associated during the entire school time, that the likelihood is that those from the non-English speaking families would speak better English than if there were segregation; that they came in daily contact both during the school hours and recreation periods?

A. You are asking for my opinion on this?

Q. Yes, as an educator.

A. Well, the fact of the matter is that the whole idea of the English standard school in Hawaii was based on the assumption that that was not true, that there were so few in number that they were swamped with the poor English. And it is up for consideration again, as you know. So I assume——

Q. Isn't the reason for the segregated schools that those who speak good English be kept in a separate school so [fol. 501] that higher proficiency be maintained?

A. I didn't get the first part of your question.

Q. Isn't the reason for the segregated schools?

A. That's right.

Q. The maintenance of higher English efficiency by those who already speak good English?

A. And to go together in one class, those who have similar problems, the children whose problems are not primarily English can move along more rapidly, and the teacher can adjust her work to that group.

Q. In any event, the school authorities here do not accept the theory—it is a theory—that mixing together closely of poorly speaking English children is better for all the children as far as English is concerned?

A. I would accept that. If the vast majority used good English and just a few were using very poor English. The theory of segregation is based, as you know, on English and English only, not on measuring the intelligence or noting the color of the skin or anything else. It is merely proficiency in English.

Q. Is it true that so far as the teachers in the English standard schools are concerned, there is a larger propor-

tion of haole teachers than in the regular standard schools?

A. I think that may have been true some years ago. I haven't had occasion to check it up in the last four or [fol. 502] five years, but I do know that there is an increasing effort on the part of the school department to get teachers of all racial groups into all schools. And such segregation or such selection as may have occurred was frequently due to the choice of the teacher herself not wishing to go into that school.

Q. In other words, the haole or English speaking teacher apparently preferred to go to the English school?

A. Put it the other way around; the others haven't asked, haven't wished to go.

Q. Now, you testified that so far as an efficient acquirement of a foreign language is concerned that the beginning of a study of a foreign language after a certain age is as convenient as at the beginning of the study at an early age.

A. My testimony on that was based on a study by Thorndyke on adult learning, indicating that learning in general is just as efficient, if not more so, at an advanced age.

Q. Learning in general?

A. Yes.

Judge Denman: Did that cover language?

The Witness: I can't answer. I'm not familiar with that.

Judge Denman: Will you inform yourself on that?

[fol. 503] The Witness: I'd be glad to.

By Mr. Wirin:

Q. Now, you say that it is your opinion that learning in general is more easily and efficiently acquired if begun during later periods than early periods in the life of the children, is that your opinion, is that what you just said?

A. No; not quite. I was saying that, as I remember Dr. Thorndyke's study, it was to dispel popular opinion that as we get older we can't learn as effectively as at a younger age.

Q. Well, is it your opinion that generally we can learn as effectively at an older age than as at a younger age?

A. Except for certain factors such as the time available for study and that sort of thing. For an equal amount of time put on a subject, yes.

Q. And that applies to languages in any event?

A. Yes.

Q. Is there any reason why the practice in the schools of teaching English is postponed until the child, say, is 12 or 15 years old? Wouldn't it be just as efficient in teaching children English to postpone the teaching of English until they reach a reasonable maturity so they can apprehend more readily?

Mr. Flynn: I think it's getting quite argumentative.

Judge Denman: Oh, no.

[fol. 504] Mr. Flynn: The answer is so obvious.

Mr. Wirin: I don't know what the answer is.

A. You are asking a question as to whether if we didn't teach English at all until they reach the age of 12, wouldn't we do a better job?

Q. Well, I understood you to say generally and particularly so far as the acquiring of a knowledge of language is concerned, that one can acquire the knowledge of language more readily at a later age than early age.

A. No, not particularly as to language. I said I wasn't sure. I was referring to adult learning by Thorndyke, and I'd have to refer to it again to know whether it included a study of languages or not.

Q. Well, I want to know your opinion rather than Thorndyke's.

A. My opinion is that probably an adult person can learn the language, any foreign language, just as rapidly and as efficiently, hour for hour study, as a child.

Q. You say foreign language. Do you draw a distinction so far as the ability of a person to acquire a knowledge of language in terms of an older age or younger age between a foreign language and the English language? Doesn't the Thorndyke study pertain generally to the feasibility and readiness of a person of an older age to acquire knowledge?

A. That's right.

[fol. 505] He was investigating various branches, and it wasn't centered, I'm quite sure, on languages, although it may have included that.

Q. Well, do you adhere, do you take the view now that generally in the acquiring of knowledge a person may do so as readily at a later age than at an early age?

A. Yes.

Q. Now, when, at what age does the teaching of English begin in the public schools?

A. In public schools generally in the first grade, in the kindergartens, the fifth year, prior to the first grade.

Q. So that in actual practice, therefore, the teaching of English begins at a very early age?

A. That's right.

Q. Isn't that because there is an accepted opinion among educators generally, and also in this community, that in order to teach persons adequately and thoroughly it is better to start them off at an early age?

A. Not necessarily. It is related to the business of the school during that current year, and the second grade and third grade, etc., and the fact that their books, when they are mature enough to use them, are in English.

Q. In other words, therefore, in order for the children in the school system to be able to use books and to talk to [fol. 506] their teacher, it is necessary to start teaching them English in the first grade, is that correct?

A. That's right.

Q. In order for a child to talk to his parents who speak a language other than English, wouldn't it be desirable and pedagogically correct for that child to start learning the language of his parents, a language other than English, as soon or as early as reasonably practicable?

A. That was my opinion in 1936, but I think there is considerable additional evidence that has been brought forward since then: the fact that there were a great deal more children enrolled in foreign language schools then than are now taking the languages, Oriental languages, offered in the high schools of the Territory, perhaps needs some explanation. You will recall the testimony of mine that you read this morning that it was our opinion then that the reason for the enrollment in the language schools was because the parents wanted the children to be able to communicate with them at home. If that is still a factor, one would wonder why so few have elected to take Japanese and Chinese in the high schools now that the language schools are closed—which raises a number of other questions.

Q. Let me raise one of them.

A. All right.

Q. Do you offer Chinese or Japanese in the public [fol. 507] schools short of the high school?

A. No.

Q. At what age ordinarily is a child when it gets to the high school?

A. If it is the four-year high school beginning with the ninth grade, he would be approximately 15 years of age.

Q. What about the parent who wants his child to speak Chinese, the child to speak Chinese to his parents before 15 years of age? He could not get under your present system any language education in the public schools, can he?

A. Not in the public schools at the present time.

Q. Isn't that the period when an immigrant parent would ordinarily want his child to be able to speak the language, his language, or perhaps the only language which the parent knows?

A. I presume so. The law, however, does not prohibit——

Q. In other words, then——

Judge Denman: That sentence wasn't finished.

A. The law, as I understand the statute, does not prohibit the attendance at a language school at an earlier age than 15, considerably earlier if he has passed the fourth grade in public school.

Q. Suppose a parent wants his child of seven years old, who is in the second grade, to understand him rather well and to speak the language of his choice, is he permitted to do that under this statute?

[fol. 508] A. The statute doesn't prohibit the use of the language.

Q. Suppose he wants the child taught by a tutor or in a school so that the child would more readily understand him, you, of course, can't have that done under this statute?

A. No.

Judge Denman: It's been admitted by your opponent.

Mr. Wirin: Yes.

Judge Denman: Let me ask you this: When do children begin to support themselves here?

The Witness: To some extent at the age of 16, 15. The compulsory attendance law, which requires their attendance until 16, permits them to leave school at 15 if suitably employed.

Judge Denman: What percentage of your children go on after 16 years of age in the schools?

The Witness: I can't answer that with any accuracy. Sixteen is about the age of the second year high school, or sophomore year, and we could get those statistics for you.

Judge Denman: Well, isn't a great body of your young people supporting themselves or contributing to support in some gainful occupation after 16 years of age?

The Witness: Definitely, yes.

Judge Denman: So if they are going to acquire language, the practical thing over the whole area, the acquisition period, is between 6 and 16?

[fol. 509] The Witness: Yes.

Judge Denman: Now let me ask you this: Twenty percent of your class speak English efficiently; eighty percent do not. Now, of course, a teacher wouldn't allow the use of pidgin English in the classroom. And in the recitation that you are having, the 20 percent speaking excellent English within the audition of the remaining 80, pedagogically speaking there would be an example set to the 80 by the 20, if your population were required to intermingle with all these percentages?

The Witness: Yes, I think that might be true to the extent that the teacher in a classroom controls the classroom situation.

Judge Denman: Well, now, a child is called upon to read something——

The Witness: Yes.

Judge Denman: Here is the English speaking child reading fluently in English, even though the child in play will use pidgin or slang or any other wicked thing that children indulge in, and grownups. But so far as the actual reading lesson, when the child is forced on the question of pronunciation, the reading of the 20 percent of the English speaking pupils, it would be a constant example to the other children?

The Witness: That is true.

[fol. 510] Mr. Wirin: I have no further questions.

Mr. Flynn: No questions.

Judge Metzger: Just a minute. May I ask, about what proportion of the teachers in the public schools today come from the mainland of the United States or are trained there?

The Witness: I could get—you could get at a partial answer indirectly by saying that for ten years or more the

door was practically closed to the importation of teachers from the mainland, but that during the war, because of the teacher shortage, we were permitted to bring teachers from the mainland. We were obliged to. And it has run to two or three hundred each year for a period of years, out of a total teaching staff of some thirty-five hundred. But prior to that time, in the early 20s teachers were being brought in from the mainland. It was from the latter part of, well——

Judge Metzger: More than were trained here at home?

The Witness: That's right. But in the late 20s and during the 30s the supply of teachers was pretty much locally trained at the University of Hawaii or local people who took part of their work here and went away to the mainland. We were obliged to give preference to local teachers, and it was only the later war period shortage of teachers that permitted us to, or made it necessary for us to bring teachers in from the mainland.

[fol. 511] Judge Metzger: Well, this may not be a fair question, but from your experience and observation,—I am asking for your opinion, if you care to express it—would you say that the mainland trained teachers are more proficient as teachers in the English language than the locally trained, or is there any difference?

The Witness: Not necessarily. I think that the greatest difference, and therefore the greatest value to a local college graduate or student training for teaching as a profession, the greatest advantage to spending anywhere from two to four or five years on the mainland, is not much related to the method or technique of teaching as it is to the elimination of peculiarly island forms of pronunciation and to a broader understanding of what it means to be an American citizen because of the experiences they have had with people on the mainland.

Judge Metzger: Arising out of their association with others? Well, is there any value to the local teacher, locally trained, by reason of their proficiency in pidgin English?

The Witness: I don't think I understand your question.

Judge Metzger: Well, in short, does knowledge or proficiency in pidgin English add anything to the qualifications of a locally trained teacher in English or does it detract?

[fol. 512] The Witness: Well, it would only be a guess. I should think that the first grade teacher who understands pidgin English forms would be better able to understand the

children who don't know good English during the first few months in school. But other than that—and it might also be that being familiar with the type of incorrect speech or the type of error, he might therefore be better able to develop means of correcting the error.

Judge Metzger: Well, then, may I ask this: Is there any practice as to where beginning teachers are placed in the schools? The beginners begin with the lower primary grades or the upper ones?

The Witness: They take their cadet work or intern teacher of one semester, which is a half of the fifth year of training in the primary and in the intermediate level up into the junior high school, seventh, eighth and ninth grades. They are placed in the first section of the third grade, primary; they are also in the fourth, fifth and sixth. In other words, they get their training in various levels, depending on their interest and the level of the school system for which they are preparing.

Judge Metzger: The new teachers, are they, generally speaking, placed in the bigger schools where they have the contact with numerous other teachers, or are they sent to the smaller schools, say in the country?

[fol. 513] The Witness: I think it is pretty generally true that they are in large schools. They are assigned, four, five or six—well, there are four or five schools in the city where they are working, and they take the class and work under not only the principal of the school but under a special supervisor who keeps close touch with the University, Teachers' College at the University of Hawaii. In fact, he serves on that staff as well as ours.

Mr. Flynn: No further questions.
Mr. Wirin: No further questions.
Mr. Flynn: Thank you.

(Witness excused.)

E. Deal Crooker, a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct examination:

By Mr. Flynn:

Q. Will you state your name, please?
A. E. Deal Crooker, D-e-a-l, C-r-o-o-k-e-r.

Q. And your occupation?

A. I am between jobs now. I'm just completing my position at Punahou Elementary School and accepting the presidency of a private school in Wahiawa.

Q. And just briefly, what is your educational background starting from the college level?

[fol. 514] A. I have a doctorate from Teachers' College, Columbia University, and did my all my graduate work at Columbia; my undergraduate at New York University.

Q. You have a Master's degree as well?

A. Yes.

Q. In what?

A. Education.

Q. And your Doctor's degree is in?

A. Administration of education.

Q. Now, how long have you held your recently discontinued position at Punahou School?

A. Six years.

Q. And just briefly, what was your work in the field of education prior to that?

A. I worked on several surveys of education and principally on a survey in the City of New York of their program for physically handicapped children. In addition to that, I have owned and operated a camp for boys and girls of elementary and junior high school age for some eight or nine years. That was back in New England.

Q. Now, Dr. Crooker, do you have an opinion from the standpoint of sound educational principles as to whether it is advisable or desirable or otherwise for children in the first four elementary grades to take up the study of a foreign language at the same time?

[fol. 515] A. I do.

Q. And what is your opinion, please?

A. I don't believe in it. I think it is unsound.

Q. And for what reasons do you arrive at that conclusion?

A. Well, there is great deal of research which has been done to indicate that the child of elementary school age has not matured to the degree that he is able to take up a foreign language at such an early age. There is a great deal of research on it, and I think the fact that in practically no public schools and in almost no private schools with which I am acquainted is a foreign language introduced at such an early age as the first four years of elementary school.

What research we have indicates very clearly that the teaching of foreign language is being postponed further, higher and higher in the educational ladder. There is plenty of ample research that shows that is true.

Q. Does the same research deal in any way with the acquisition of the foreign language at a later age as distinguished from that which can be attributed to students in the early grades?

A. If I may refer to some material which I have here—I think you would find that attempts to teach foreign languages at too early an age do not result in very successful acquisition of the language or skill. I might add that that is [fol. 516] true of many other subjects in the curriculum. Educators are realizing more and more that some of the skills we are attempting to teach boys and girls at the five and six year old level could be much better postponed until a year or so later. We used to become very concerned about the child who didn't learn to read in the first grade. We no longer are concerned about that child. We find that many of them acquire the skill at a slightly, at a year or so later, and their ultimate success in the reading ability is approximately the same. Some children learn to walk at ten *years* of age; some at fourteen months. Their particular skill at the age of three years is approximately the same. I think the whole thing depends on the maturation level of the child. And we have such things, we educators throw around such terms as "reading readiness" which indicates whether or not a child is approximately ready to begin the study of reading. It depends on the multiplicity of different factors, ability to manipulate the small muscles of the eye, general intellectual level, and so on.

There was a, there is a general tendency for the foreign language to find increasing competition on the secondary school level. Other subjects considered more important are giving it stiff competition. Dr. Ferris found a marked trend in the period 1929 to 1934 towards less stress in this area; one tenth of the schools involved had dropped French, the [fol. 517] study of the language, foreign language, French, while relatively few had introduced new foreign language courses. And reports of the Secretary of the College Entrance Examination Board for 1932, '34, showed a decrease of 23 percent in enrollment for modern language examinations.

Now, you asked the question as to whether the foreign language introduced at an earlier age developed better competency. Actually there is a good deal of indication in a study conducted by Coleman, Hennon and Wood that there was a great discrepancy between the aims and values generally assumed for foreign language study and the actual attainment resulting from the two-year course; of 439 teachers of modern languages only 36 percent, 18 percent and 40 percent respectively claimed attainment after two years of study by as many as 5[illegible] percent of their students of objectives listed by Coleman. These objectives being: (a) Ability to read the foreign language with ease and enjoyment; (b) the ability to communicate orally with natives; (c) ability to communicate in writing.

Judge Denman: Were those foreign language schools or were they courses intermingled with English.

The Witness: These were courses given in the usual public high school.

Judge Denman: So that the question of the school in which for a period of two hours a day no other language is spoken did not arise in the experience of these investigators?

[fol. 518] The Witness: Unless a foreign language teacher happens to be the person who believes——

Judge Denman: I'm talking about these three people you are quoting there. Were any one of those persons familiar with the teaching of a foreign language school in which nothing was spoken but that language?

The Witness: I am not aware of whether they are or not. But there are many teachers of foreign languages who operate on the basis that no language is spoken in the classroom except that foreign language. So that you would have a situation to some small degree approximating what you have spoken of.

Judge Denman: It is rather a small degree, isn't it? Here you have now the evidence here that here are groups, 40 percent of the population in the case of the Japanese descended people, who have an alien language and culture, and you have parents who speak no English, parents who speak little English, and parents who talk English to one another, as I see the three groups here. You have the family language which is entirely English, but here is a parent that doesn't speak any English, and here is that

child that is, breaking away from him in his associates, associations with other children. You have various alien cultures. What is the parallel in that situation of maintaining a relationship of parent and child where a disruption of language between the two, what parallel is there between that and any of these classes where French is taught, [fol. 519] as I was taught in the University for a couple of hours a week, or four hours a week with very excellent teachers, what is the parallel?

The Witness: Very little.

Mr. Flynn: I might state, your Honor, that my original question had to do primarily with whether learning a foreign language should be taken up at an early age or whether it should be taken up at a later age, as some testimony on behalf of——

Judge Metzger: May I ask a question there? The thought is rather confusing to me. Now, foreign language in the case is rather relative it seems to me. Take a child from its mother's breast, that hasn't heard anything in the home other than, we will say, Chinese or any other language different from English. And when it approaches three, four years, it commences running around and gathering a little of English from its associations, but still the home language is the language of the parents. Now, that child when it reaches the age of six, what is the foreign language to it?

Mr. Flynn: Well, that is entirely well-taken, your Honor. Technically, I think that the foreign language to that child is English. But I have tried to avoid that confusing situation to keep our own testimony here on the proposition that the foreign language is the one other than the English.

[fol. 520] Judge Denman: Assuming the distinction that Judge Metzger has brought up, wouldn't the proper time to perfect English after you got a little colloquial ability to talk, wouldn't the proper time to perfect your English, which is a foreign tongue to the Japanese and Chinese children that we have referred to, be about 15 years of age? And isn't this attempt to force English and its perfection in these earlier years when the mind is not as ready to do it liable to cause neurosis?

Mr. Flynn: Yes, it is liable to, your Honor. However, I might point out right now that if there were schools being conducted entirely in the Chinese or Japanese languages, and all the other subjects were taken in too, that that par-

ticular question might have some relevance. But all of these plaintiffs are sending their own children to the public schools and letting the public schools do some good. And if we take it from the other angle, that English is a foreign language, then it is different.

Judge Denman: Well, the problem that I am stating is that it is not a problem pertaining to the problem on the mainland. The problem is one of sending—the problem is one of competency, ascending competency in English throughout the Islands. And the question that is presented to this board is, as one of the Judges sees it, whether or not with that ascending competency, growing power of the [fol. 521] mastery of English, whether at that moment you can take from the parent this particular part of the child's education. That is your problem, as I see it, your Constitutional problem. And it is, as all these gentlemen indicated to us, a matter of degree. They will give you a figure, I am sure, on the percentage of the factor in determining whether or not a child is disturbed and materially hurt at any particular time. So I take it that the question we have got to develop here is a matter of weight, but with factors utterly unlike anything prevailing in the schools on the mainland.

Mr. Flynn: That is true.

Judge Denman: Take some of the Mexican population of Southern California or identical conditions.

Mr. Flynn: That is true, your Honor. But I would like to emphasize at this time, so that we will not be narrowed down to too fine a line, because I don't think it is strictly applicable, I would like to emphasize that the statement of the legislative findings and the declaration assumes something which will be readily conceded by the plaintiffs, that all the children we are now concerned with are going to the public or private schools in the Territory. They are going to be citizens of the Territory. And they are going to those schools at the wish of their parents. Their parents are giving to the schools the problem of raising their children on the educational proposition. And our schools [fol. 522] are doing the best they can. And I think they are doing a very fine job, and more and more. And if we establish, as we hope to, that the work of our schools is being seriously interfered with, both from the standpoint of the children's welfare and from the standpoint of the progress made by the schools, then these inquiries are pertinent, these inquiries concerning the matter of postponing

the acquisition of the foreign language. And the foreign language I am talking about throughout the case is the Chinese or Japanese or any other, other than English. And Judge Metzger's question is entirely pointed, and rightly so, to an existing or possibly existing condition, namely, when English is a foreign language to a particular child. There are certainly a few left in our community that are still that way. They are in an extremely rare instance now. A generation ago it was common. But I concede that we did get somewhat sidetracked from my original purpose in asking the particular question of the witness.

Q. I would like to ask you now, Dr. Crooker—you have expressed an opinion that the teaching of foreign languages in the very early grades is unsound. Now, do you have an opinion, any opinion as to whether the teaching of a foreign language starting with the first grade—and concerned now only with the first four grades—can or does have any harmful effect upon the children in those grades?

[fol. 523] Mr. Wirin: Objected to as too broad and general to be applicable to the issues in this case, particularly in view of the concession which must be made by counsel that generally the foreign language situation doesn't apply here where the language which is sought to be learned is the language indigenous to the child coming out of his domestic life. I wouldn't press the point, if your Honor please.

Judge Denman: Aren't your complaining that the statute is not supported by the findings of the legislative committees in regard to neurosis and the like, occasioned by foreign language schools?

Mr. Wirin: Yes.

Judge Denman: Now, here is a question that may lead into that.

Mr. Wirin: Well, I would have no objection to a question which will have some relevancy to the situation here. My objection is that the question is too generalized for the answer to be of any value to the issue of the inquiry here.

Judge Denman: I thought the question was going to be followed by the next question in that respect.

Mr. Wirin: Well, I'll wait.

By Mr. Flynn:

Q. Do you have the question?

A. Well, I would divide the answer to that question as to whether it was of a deleterious effect on the child into three

parts. First let us discuss the question of intellect. I [fol. 524] believe that the introduction of a foreign language at such an early age is going to tend to confuse the child in the proper acquisition of skills in the English language, reading; that has to do with reading, it has to do with written work, it has to do with the spelling; and we confuse our children enough, it seems to me, in trying to impart to them the English language in all its nuances. And this is the introduction of another foreign language, and it is going, it seems to me, to place on that child a confusing issue. In other words, he is going to have this: be pulled by both languages as to which one he is going to express himself with. With the parents he is possibly expressing himself in one language, and in school in another. And it may be a confusing issue from that point of view. Now, that is the intellectual side.

On the physical side, I believe as a school man who is pretty well aware of what the average child of six, seven, eight and nine—that is the age we are talking about—has to go through in the average good school. It hits him when his fatigue curve is at its very lowest, right after school. We then state to this child, you will now go in and study further, another language. He is pretty tired, he is a pretty tired kid. And it seems to me, that those afternoon hours are ideal for getting out and getting some physical activity, some fresh air, and engage in various hobbies and things such as he will do. From that point of view it seems [fol. 525] to me that is a very harmful effect on him.

On the emotional side, possibly my reaction is not based on true facts but it is my feeling that the qualifications of a good teacher include not only proficiency in a particular subject taught but a clear-cut understanding of the basic principles in child development, to know how to handle children in a pedagogically sound manner so that their own security is developed to the point in all teaching situations where they have security, which is after all merely a positive way of saying "No neurosis." I wonder how qualified in terms of knowledge of child development and the proper method of handling children are our teachers in foreign language schools? What I have seen would lead me to some question as to whether they are well-versed in pedagogy to the extent that we require of the average public and private school teacher here in the Territory.

Judge Denman. Do you speak Chinese?
The Witness: I do not.
Judge Denman: Nor Japanese?
The Witness: No.
Mr. Flynn: You may cross-examine.

Cross-examination.

By Mr. Wirin:

Q. Now, in mentioning the various possible harmful effects of a young child acquiring a foreign language, I [fol. 526] understood you to testify that the introduction of another foreign language tends to have an intellectually harmful and intellectual effect upon the children. You talk about the introduction of another foreign language. I understood you to testify that the introduction of another foreign language would have some kind of an unfortunate effect upon the intellectual life of a young child. Now, you talk about the introduction of another foreign language. Suppose that the situation is that a child, a parent wants its child, or her child, to learn more about the language which is spoken at home, would your testimony about the introduction of another foreign language into the life of a child apply?

A. Yes, it would to this extent, I believe, because you are introducing a new element just as a child who speaks English from the age of a year and one-half or two years is introduced to the intricacies of the written and symbolic aspects of the English language. Now, when you begin to introduce a child to that in another foreign language, whether it be Chinese or Japanese or any language—we are not discussing the speaking of that language so much as we are the writing of the language and the reading of the language—and it is that particular aspect, as the testimony brought out this morning, we are trying to develop basic habits of starting from left to right. We do have children who have reversal tendencies who say "was" instead of [fol. 527] "saw", who don't know well enough to begin here. Languages such as Hebrew and Chinese and Japanese use a different format from ours. And when you tell a child he has got to read this way for half the time and the other way for half the time, you are bound to confuse him. He can speak probably just as proficiently.

Q. You don't know, of course, at what age and in what grade in the Chinese or Japanese schools the written language is first introduced, do you?

A. No, I don't.

Q. So that if the written language were not introduced in the early stages of a child's studies in the Chinese school, you would have no objection on that ground?

A. On the intellectual grounds, no.

Q. Now I will go to the other. Now, you say on the physical side it is harmful, it hits the child just when he is fatigued, is that true? That would be true?

A. When his fatigue curve is lowest.

Q. That would be true whether a child would go to a parochial or religious school just the same as a language school?

A. Absolutely.

Q. Your objection to parochial and religious schools on that ground would be the same?

A. Absolutely.

[fol. 528] Mr. Flynn: May I clarify that for a moment? I think we are all referring to attendance in school after the regular school day.

Mr. Wirin: Yes.

Q. Is the view which you have expressed of opposition to religious schools on that ground generally accepted by educators?

A. I would say so, yes. I think the average person feels that whether they are schools, foreign language schools or religious educational schools, or violin lessons, or a lot of other things that are loaded on poor kids at that age——

Judge Metzger: Trade schools, too?

The Witness: Well, at this age I don't think they would go to a trade school. They are only six, seven or eight.

Q. In other words, it is your view that all the schooling should be in the public schools, and when that schooling is terminated any further schooling is harmful to the physical side of the child?

A. As a principal of a private school, of course.

Q. You will question that?

A. I would say.

Q. Until now you had that view?

A. Will you repeat your question?

(The reporter read the question.)

A. Formal type schooling, yes.

[fol. 529] Q. Now, on the emotional side. You said that it was important for a child to have security. Doesn't the child acquire the greatest security by a sense of security in the home, by a sense of that feeling of relationship and understanding of the parents of the home and the feeling that the parent understands the child?

A. Very definitely.

Q. And if a child is able the more fluently and closely to speak to the parents in terms of the original language which the parents know, wouldn't that aid the security and feeling of the child?

A. Yes, but you see, it is inconceivable to me that a child could be brought up in a family that spoke only Chinese and not be able to speak Chinese to get along in a sense of security with the family by the age of five, six or seven. He must have developed that language skill.

Q. Of course, you have never been brought up or been in a Japanese home to be an expert on the subject?

A. Well, I have visited many Chinese and Japanese homes in this community.

Q. In other words, you feel that a Chinese child acquires enough Chinese within the first six years so that it doesn't need any further education in Chinese?

A. Unless he cares to pursue it in higher education as a special skill, that he would study as a scholar.

[fol. 530] Judge Denman: But would you say he was learning a foreign language when he pursued it after this proficiency that you just said he has? Where is the strain on your assumption that this child can understand its parents in a foreign language when five or six years old; where does it become a foreign language for him to go on with it?

The Witness: Well, of course, in the strict sense of the word my testimony is probably incorrect. If he is speaking a language, it is difficult to say which is the foreign language and which is the mother tongue. I think in all probability you have an ascendancy in one language up to a certain point, and gradually he begins to stop thinking in that language and it becomes then—he begins to think in another language, and the other is an ascendancy.

Q. Well, your whole testimony is directed to the problem of foreign language, problem of a child or persons acquiring knowledge of a foreign language, isn't that right?

A. That's correct, I believe.

Mr. Wirin: That's all.

Mr. Char: May I ask just two questions?

By Mr. Char:

Q. Dr. Crooker, did Punahou teach French in the first, second, third and fourth grades?

A. Yes, they used to do it long before, 1923 up to '32.

Q. From 1923 up to 1932? Punahou is a private school? [fol. 531] A. That's correct.

Q. And you were for the past six years the principal of the elementary grades at Punahou?

A. That's correct.

Q. And did you know why they stopped teaching French in the first, second, third, fourth grades in Punahou School, in Punahou College or Punahou School?

A. My guess is, private schools are very——

Q. Well, do you of your knowledge know, not guess.

A. What did you say?

Q. Do you know the reason why they stopped teaching in 1932, the teaching of French in the first, second, third and fourth grades in Punahou?

A. I have talked to one or two people about it, and from what I can gather there was a small minority of people who are rather vocal who wished to have the introduction of French. Many private schools, fashionable private schools went in for that sort of thing. And I think gradually, as the research began to pile in on them, these people began to realize that they were wasting a lot of children's time at that early age, and they just dropped it for pedagogical reasons as being unsound.

Judge Denman: Is that a guess?

The Witness: Partially, yes.

Judge Denman: I say that because I learned my French [fol. 532] at six or eight, and by being taught by my French teacher my teacher would have come within the range of this group here. All the French I had ever known, I got at that time. I am just wondering how far languages have been eliminated on the growing doctrine of America is good enough for us, and why should all these foreign notions

come in through foreign languages? Undoubtedly it was the basis of these laws against Germans.

Judge Metzger: In the event that Chinese parents wanted their child to learn Chinese and become proficient in it, would it be your idea that the best thing for the child and the best thing for the public school system in the event that the child was to go to a public school, that the child should be withheld from the public school until it had finished its Chinese language education?

The Witness: No, I don't think he should be withheld from the public schools.

Judge Metzger: You don't think it would be best either for the child or for the public school system to withhold him?

The Witness: No, I do not.

Judge Metzger: Well, then, what as to the reverse of that, if the parent wanted the child to become proficient in Chinese as well as in English, then why should they be retarded in the progress in Chinese but pushed forward [fol. 533] in the study of English first?

The Witness: Well, I don't feel I can discuss with any validity the question as to whether or not the parent has a right to place the child in the school or doesn't. The only thing that I am concerned about is the question of what is best for the particular child. And it is my feeling that a study of a foreign language in the first four grades of the elementary school does have a deleterious effect upon the child. And on that ground I would definitely be opposed to it. But at the same time, as to whether or not the parent has a right to, or should, I feel I am not qualified to discuss it.

Judge Metzger: Well, I didn't mean as to rights. I meant as to their best interest of the child.

The Witness: I don't think it is quite possible to give a blanket statement as to what is the best for any child. I think each individual case would have to be studied on its own merits and a conclusion drawn from that. And as far as any straightforward answer, I don't feel that any that I would give would be very valid.

By Mr. Char:

Q. Well, wouldn't you say that the parent would be the best judge of that as to the best interest of his own child?

Mr. Flynn: I think that's argumentative, your Honor. [fol. 534] We are concerned with the testimony given.

A. Well, many parents want me to take a horse whip to their children, too, and have asked me to do so, but I don't do it.

Q. But as to the studies now. We have reference to foreign language studies.

A. The same thing applies there. Parents are not trained educators and I don't think one should expect them to be.

Judge Denman: Let me ask you this: If it be true that to many of these Japanese the English language is a foreign language to them, then wouldn't you expect under the pressure of learning a foreign language and with a constant current use of the native tongue at home, that that would produce a neurosis?

The Witness: Except to the degree that I feel very strongly that many of our second generation boys and girls are in a cultural vacuum to the degree that they no longer accept, because of the pressure of newspapers, radio, the boys and girls with whom they associate, the "Speak English" campaigns that we pushed during the war, they have come to look askance at the culture of their parents, a culture which is firm and sound and good; then they haven't yet really gotten new culture in the degree that they have learned what America means or to speak the language or [fol. 535] be really secure in it. The result is a cultural vacuum, with very few values to really hold those kids together and integrate them. I believe that we see that in the City of New York. I have seen it where you have the boy and girl of Russians or Italians, of Russian or Italian ancestry, where the parents are speaking another language. They look at the family as an old hat and are ashamed of them.

Judge Metzger: What age?

The Witness: I think it goes right straight up through high school. They have that feeling.

Judge Metzger: About what age would it begin, that kind of thought of a child?

The Witness: It would vary from child to child, but I would say it would begin to be apparent to the average child at the age of six, seven or nine, somewhere in there he begins to see that other parents don't talk like his parents and he feels ashamed of them, and he looks askance at their

value. That would create, therefore, I believe—he is torn between two cultures and he really is confused, and he is insecure, and therefore he would have a mild neurosis. I won't say neurosis. I would say it creates a feeling of insecurity because neurosis to me means a pretty—he's pretty well over the hill.

Judge Denman: So that that is the thing that arises out of a conflict of languages, and if schools had anything to do [fol. 536] with it it would be simply one of the factors in it. But the disturbing thing is there for these kids, particularly where they are on the borderline of the two. I think that's it. Then your testimony is that it is a bilingual thing, a language, an old culture intruding into a new culture. That is the disturbing factor, is that correct?

The Witness: Yes.

Mr. Flynn: Your Honor, may I ask a question following up on that question, at that point?

By Mr. Flynn:

Q. Referring to the same situation on the culture that you have described, Dr. Crooker, do you believe the difficulties therein existing in the individual children would be in any way decreased or increased by taking up of a formal study of the home language, the foreign language? I mean the foreign language, the language of the parents. English is the English language; the other is the foreign language for this question.

A. It might help the child to actually understand its parents' culture a little better.

Q. How about the formal study at the age of six, seven, eight and nine, while the child is going to the public schools in the first, second and third grades, too?

A. You see, cases are not black or white. I have already listened to reasons why I would disapprove of it; I can see [fol. 537] one possible good growing out of it, in that it would possibly help to understand his family's culture. To that degree it would be good. It is a one mitigating factor possibly about the whole thing.

Mr. Flynn: I have no further questions.

Mr. Wirin: No questions.

Mr. Flynn: Thank you, Doctor.

(Witness excused.)

Judge Denman: We will take a short recess.

(A short recess was taken at 3:00 p. m.)

After Recess

Mr. Wirin: There was some discussion at the beginning of the trial about the figures as to the number of children who attend private schools and the number in public schools, and Mr. Flynn has been good enough to furnish it and it is here and we'd like to offer it in evidence if there is no objection. It shows, if I may say, that the total school attendance is 82,874; the total private school attendance is 18,715, a bit less than 20 percent.

Judge Denman: Public and private schools as defined by prior enactment?

Mr. Wirin: Yes.

Judge Denman: But here we have a new kind of school consisting of one person teaching two persons. Now, my impression is that that must be a very large number of [fol. 538] schools, number of persons who are teaching two persons to speak a language, parents themselves and other persons. So these figures, I take it, and I ask both of you, these figures do not cover the schools which are schools within a definition of the statute?

Mr. Wirin: That is correct.

Judge Denman: There is no attempt to do that here?

Mr. Flynn: No, nothing of the sort. I don't know where precisely this will be pertinent. However, Mr. Wirin requested it and thought the Court might want it with reference to some possible questions that might come up.

Mr. Wirin: Except this, that I thought it was interesting even as to the formal private school.

Judge Denman: It will find a place in some of the testimony that you had already.

Mr. Wirin: Yes. But I was saying that there were a large number of children who go to private schools, larger apparently on the Islands than I think on the mainland. But that's of no great consequence.

Judge Denman: If there is no objection, it will be admitted.

Mr. Flynn: Do you want this as the plaintiffs' exhibit?

Mr. Wirin: Yes.

The Clerk: Plaintiffs' Exhibit "B".

(The document referred to was received in evidence as [fol. 539] Plaintiffs' Exhibit "B".)

Mr. Flynn: Maybe I could make mention of one point, your Honor. "Schools" as defined in the Act could include an individual tutor teaching two or more persons. I might say, to the Defendants' knowledge, there are no such schools, if that is of any use in considering the exhibit.

Judge Denman: You say you will offer no testimony respecting those schools?

Mr. Flynn: That's right.

Judge Denman: Now, what knowledge have you in offering the statement to us that there are no parents teaching two children, French, Portuguese, systematically?

Mr. Flynn: The only knowledge, only the knowledge based on the fact that no report has been made by any person.

Judge Denman: Has there been any investigation as to this new class of school created by this statute?

Mr. Flynn: To my knowledge there has been no investigation. I might say there is one language school, which will come out in the evidence, I'm not sure. I haven't seen this exhibit in any great length but if it is not covered thereby, if it is not covered in the exhibit it will be brought out in the trial.

Bruce White, a witness in behalf of the Defendants, being duly sworn, testified as follows:

[fol. 540] Direct examination.

By Mr. Flynn:

Q. Will you state your name, please?

A. Bruce White.

Q. And your present occupation?

A. I am associate professor of education at the University and acting dean of Teachers' College.

Q. University of Hawaii?

A. University of Hawaii, yes.

Q. And just briefly your own educational background from the college level on?

A. My undergraduate work was with a major in mathematics, University of Oregon; my graduate work in educa-

tion and psychology at the University of Washington. I have the M. A. and Ph. D.

Q. Both at the University of Washington?

A. That's right.

Q. Now, Dr. White, how long have you been connected with the University of Hawaii?

A. It will be eleven years next September. I came in September of '36.

Q. You have been continually with the University since that time?

A. That's right.

Q. Now, will you tell us, Dr. White, whether there is any generalized or widespread language deficiency among the [fol. 541] students at the University of Hawaii?

A. You would mean in comparison with mainland universities?

Q. Yes.

A. I think so.

Q. You think there is?

A. Yes.

Q. Has the University had to take any steps to endeavor to correct that deficiency, steps of the nature that would not be required in all or most mainland universities?

A. We have spent quite a bit of taxpayers' money on corrective speech classes which are non-credit. And yet it's in the sub-collegiate level. I would guess that perhaps 60 to 70 percent of our students take at least one semester of these non-credit speech courses. At one time we offered special courses of a non-credit nature in written English and composition, and we discontinued that for awhile. At present we have two courses in freshman English. One group meets five days a week for three credits; the other, three days a week for three credits. So that there is this special work on the basis of language deficiency.

Q. And all of this is non-credit work?

A. That's right, yes.

Q. Being given because of the language deficiency?

A. Yes, I think that would be a safe statement. We [fol. 542] give it. We didn't think of it in those terms. That's what our students need, so we give it to them. It isn't a college level, so we do not give credit for it.

Q. Now, Dr. White, in our Teachers' College is there any emphasis on English differing from that existing in usual teachers' colleges throughout the country?

A. Well, this same speech work carries over to the Teachers' College students, although they do not, they are not measured by quite the same standard. We expect a little higher standard of our teachers than we do of our regular graduates. But they do carry a considerable amount of corrective work in speech as well as a good deal of work intended to assist them when they become teachers. And I am quite sure that we do a considerable amount more than most mainland normal schools or teachers' colleges.

Q. In English?

A. Yes, in that respect.

Q. Now, Dr. White, from the standpoint of educational psychology, assuming that there is a language deficiency among pupils in the early grades of elementary school, do you have an opinion as to whether such language deficiency might or could cause harmful results from the standpoint of mental conflicts or disturbances?

Mr. Wirin: We object to that on the ground that the question is too broad, unless there is some further descrip-
[fol. 543] tion as to what language deficiency means.

Mr. Flynn: English language deficiency.

Mr. Wirin: Ability to read?

Mr. Flynn: Ability to understand, read and write English.

Mr. Wirin: Well, we object to the question. There is no showing of any ability to understand English. There is no such showing in this case thus far, showing of inability to read or write.

Mr. Flynn: I don't think that is correct, your Honor. I think there has been a substantial showing that there is a language deficiency, that teachers have trouble explaining to children and children have trouble in understanding. And it's been testified to already.

Judge Denman: The objection is overruled.

A. I am not quite sure. I think your question was as to whether the presence of a language deficiency caused various sorts of emotional disturbances?

Q. Yes.

A. Well, I say that it is almost certain that any sort of difficulty, any deficiency that made it difficult for the child or an adult either to know what to do in a given situation would cause emotional difficulty. In the particular case of the language, in the lower grades where we are trying to

teach, if we are trying to teach simultaneously two languages, that is, that we are trying to teach the child that in [fol. 544] one situation a response is correct, and in a very similar situation different only in respect of the person, that another response is correct, so the child doesn't know which he should do—I would be quite sure there will be difficulty, emotional disturbance of some sort, interference with learning.

Q. Interference with learning?

A. I would be sure of that.

Q. Now, in a situation where a large number of children in the first four grades in school have some English language comprehension deficiency, do you have an opinion as to whether those children would be subjected to any harmful or disadvantageous results by simultaneously taking up the study of a foreign language?

A. Well, I think that would be an illustration of what I was just referring to, that that would be the kind of a situation where neither thing were mastered. And we are trying to have the children learn two conflicting things at once. We are teaching him to do two things in response to a certain stimulus. He can't do both of them. We teach him to use an English word. We teach him to use a Chinese word. He can't do them both. We teach him to read from one direction. We teach him to read from the other direction. He can't do both. Now, if you have a very tough-minded child, it will run off of him. He won't do anything. [fol. 545] If you have a child who is greatly concerned about the difficulty, then I think you would have a very real difficulty.

Judge Denman: Would you have the same difficulty with a child whom you are trying to teach grammar to and mathematics?

The Witness: Not quite, because there is enough difference between those two that he wouldn't have the confusion. The difficulty I am referring to is where the stimulus, the situation is the same but in one case he responds one way and receives approval and in another case he must respond in a different way. There is a little conflict between mathematics and grammar in that the logic of the two are not identical.

Judge Denman: Yes.

The Witness: But it isn't likely that a young child would be involved in that, I don't believe. I think the difficulty comes where there is, where they are close enough together that they are confused.

Judge Denman: So that a child coming out of a Chinese or Japanese-thinking family and is confronted with the English language, and its different approach in idiom, is liable to be confused?

The Witness: I would be sure.

Judge Denman: And neurosis may occur?

[fol. 546] The Witness: Yes.

Judge Denman: Difficulties?

The Witness: Yes.

Mr. Flynn: You may cross-examine.

Cross-examination.

By Mr. Wirin:

Q. Let us assume a child in a Chinese family whose parent speaks no English but is very conversant in Chinese, and whose parent teaches that child Chinese from the fourth year up to the eighth. The emotional disturbance which that child would suffer from studying English in a public school would, of course, be the same as if the child were taught in a formal Chinese language school, would it not?

A. You are assuming that the child has not mastered Chinese in that four-year period, that is, that his mastery or his level of mastery of English and of Chinese would be somewhat approximate?

Q. Yes.

A. Yes, well, yes, in that case the study of English would, you might say was the cause of the difficulty, or you might say the fact that you have added a second language to a first is the cause of the difficulty. I am not sure which is the cause.

Q. But the difficulty would be the same?

A. Oh, yes.

[fol. 547] Q. Whether the source of the teaching was at home by his parent or in any formal foreign language school, wouldn't it?

A. With some limitation. If you will assume that the things that are being taught in the home in one language and in the school in the other language are the same; and

if the procedures that are being used are approximately the same. If you will forgive me, what I am trying to emphasize is that it is when the learnings are quite similar but differ in a not too noticeable but significant point that you get the conflict.

Q. Of course, if the type of language, foreign language, which to the child was substantially dissimilar from the English language, and the method was substantially dissimilar, there wouldn't be any conflict or not so much conflict?

A. I am not sure. The only evidence that I can refer to, the only thing that I am reasonably sure of, is some studies with adults in studying foreign languages. Now, there is evidence—I think it is quite sound; I am not going to be able to quote you the source—where an individual studying say French and German, both foreign languages, beginning the study of the two at the same time, that there will be conflict. There will be a negative transfer for, oh, perhaps four or five months. If one language is started before the other, either the French or the Spanish, carried [fol. 548] along in the normal procedure for a semester, a half a year or so, then there is a positive transfer. That's what he has learned in French. What he has learned in French will transfer to Spanish. Now, if the two languages are French and German, the time that is necessary to avoid interference is longer, which I think would make me say No to your question.

Judge Denman: Doctor, have you had experience in the Swiss schools where you have your tri-language community, let's say, your Italian and your German and your French, where the Swiss that are trained to be waiters that come over to this country speak four or five languages that they have acquired largely in their adolescent period in the Swiss schools? Have you had any experience with that?

The Witness: I haven't had experience with that.

Judge Denman: Neurosis does not seem to have extended to the capacity where they tend to half a dozen people of different language, in the dining room.

The Witness: Would it be likely in that case that one language was fairly well mastered before the others begun?

Judge Denman: We are all familiar with the Italian-Swiss and German-Swiss and French-Swiss, all speaking

three languages and they come over here and apparently are well-adjusted people.

The Witness: Oh, yes.

Judge Denman: Well, I wonder if anybody has made a [fol. 549] study of that? There you would have your trilingual base of a population, and you probably will have a systematic study of neuroses in your medical department of the Government.

By Mr. Wirin:

Q. Doctor, there of course have been no studies comparable to the study that Judge Denman is inquiring about, so far as the emotional effect upon children in the schools in the Territory in connection with the matter of bilingualism, have there?

A. Not that I am aware of, no.

Q. Now, I understood you to testify that if a child, the hypothetical child I was talking about, was equal in his acquirement of Chinese and English, there would be the conflict that you talked about?

A. In the early stages of the learning.

Q. Suppose the child, this hypothetical child, had had a good deal of knowledge of Chinese before he was six years old by virtue of having been taught some Chinese by his parent and having spoken some Chinese to his parents, so that he was reasonably proficient so far as a six-year old could be in speaking Chinese; and suppose he spoke primarily Chinese and very little, if any, English; in that circumstance when that child registered in the public schools he would have some proficiency in Chinese and none in English, is that correct?

[fol. 550] A. Probably yes.

Q. At least he'd have an advanced proficiency in Chinese?

A. Yes.

Q. Well, the conflict that you talked about, then, would not apply, it seems to me, since he had already received some proficiency in one language and was beginning his studies in the other?

A. With a little qualification. This early Chinese, I think you said would be spoken Chinese. I think that is quite significant. If by the time he entered the regular school he had a reasonable degree of proficiency in spoken, written and the reading of Chinese, then I would say Yes.

I would say that in the situation which you talked about, where the boy received, or the child received a great deal of work in spoken Chinese, that there would be no difficulty in learning to speak English. You see my point? It is where the two things are of the same sort and on the same level that you get the difficulty.

Q. I think I understand. In other words, therefore, if a child in a Chinese family spoke Chinese and generally acquired the knowledge of Chinese by the time he was six years old, and then registered in the public schools, wouldn't that child be better off emotionally if he continued in his studies in Chinese school, for instance, and continued in [fol. 551] growing in his proficiency in Chinese so that he'd always be in proficiency ahead so far as Chinese was concerned when compared to English, and wouldn't that mean that he would have less conflict?

A. Well, I don't think I would agree with that. I don't see any reason to think that he would get more satisfaction and more confidence in knowing Chinese better than he knows English. I don't believe so. I am not sure if — is what you meant.

Q. Well, let me ask you this: Wouldn't he get some confidence and some security in being able to converse reasonably well with his parents?

A. Oh, yes.

Q. That is a decided educational and psychological advantage, isn't it?

A. Oh, yes, no question about it.

Q. Wouldn't the psychological advantage in the sense of security in being able to speak the language of his parents, outweigh any disadvantage in acquiring a knowledge of English, particularly if he already was somewhat proficient in Chinese?

A. Well, another way of saying that is, if the need for security in the home were greater than the need for security in the schoolroom, then the former is more important, yes, of course. But if it is a child who in the situation where [fol. 552] he does have security in the home, where he is expected and accepted, and he has no difficulty, then I would think the other difficulty might be more serious. That is, it can't be generalized. It depends on the individual.

Q. It is speculative anyway?

Judge Denman: What is speculative?

Mr. Wirin: This child that we are discussing, the matter of emotional conflict.

A. I don't believe I would agree to that.

Q. You would not agree? Are there any scientific studies, Doctor?

A. Yes, I think we have some, as I mentioned a moment ago, on the learning of languages. I wouldn't want to——

Judge Denman: That was adult.

Q. I'm talking about scientific studies among children, in bilingualism.

A. In that, I don't know.

Q. So that matter is pretty much exploration and speculation?

A. I like exploration better than speculation.

Judge Denman: Further exploration. For success it would be exploration first?

The Witness: Yes.

Q. Now, where a child is in a family, a Chinese family, where the father speaks almost entirely Chinese and perhaps [fol. 553] a little pidgin English and very little English, do you agree that it would tend in those circumstances to give the child additional securities if he is better able to communicate with his parents in the only language which the parents speak?

Judge Denman: That's the question which has been asked before.

Mr. Wirin: I don't know whether he has answered that.

A. Well, additional securities in addition to what? Assuming that you have two extreme situations where there is no communication and good communication, or is there enough communication so that he does have security?

Q. Let's put it this way: Wouldn't the better the communication result in the greater security?

A. Oh, yes.

Q. Well, that's enough on that.

Redirect examination.

By Mr. Flynn:

Q. Dr. White, you referred to the studies of two languages at the same time. I believe you expressed the

opinion that that can have harmful effects on the child for various reasons.

A. Yes. You will have to qualify the circumstances. Yes.

Q. Now, you are asked to assume one situation where a child would have proficiency in Chinese and thereupon [fol. 554] enter first grade, maybe with no knowledge of English. Do you have an opinion based upon your knowledge of what a child or all average children starting in first grade in public or private school—would that child, assuming the previous existing knowledge, proficiency in Chinese sufficient to get along, be benefitted or harmed if he were at the same time on entering first grade to take up the formal classroom academic study of the Chinese language which he had previously known?

A. I think you would then again be getting a situation where he is learning two closely related but significantly different things at the same time. So that there could be that interference. If he is working on the grammatical structure of the two languages at the same time, and for the first time both of them, yes, I think there would be; I would be quite sure there would be interference.

Mr. Flynn: I have no further questions.

Judge Denman: Doctor, is it conceivable that a Chinese kid grew up on the streets of this town and not know any pidgin English at the age of six?

The Witness: I don't think so.

Judge Metzger: Well, there are a lot of sections in the Territory.

Judge Denman: Well, let me ask that. I have in mind my father's experience in teaching in San Francisco. But [fol. 555] how about the outlying land? Are there any communities where Chinese would be all that a youngster would know at the age of six years?

The Witness: Limited to the Chinese? I doubt that for Chinese. I don't know. I wouldn't be sure.

Mr. Wirin: Would that be true of Japanese?

The Witness: I don't believe it would, although I can't speak authoritatively.

(Witness excused.)

Judge Denman: We will recess until tomorrow morning at nine o'clock.

(The Court recessed at 3:43 o'clock, p. m.)

[fol. 556] Honolulu, T. H.
June 28, 1947.

(The trial resumed at 9:15 o'clock, a. m.)

The Clerk: Civil No. 765, Mo Hock Ke Lok Po, et al. vs. Ingram M. Stainback, et al., for further trial.

Richard Myer, a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Flynn:

Q. Will you state your name, please?
A. My name is Richard Myer, M-y-e-r.
Q. And your occupation, Mr. Myer?
A. Assistant Superintendent, Department of Public Instruction.

Judge McCormick: Mr. Myer, will you raise your voice, please? You are quite a distance from here.

Q. Assistant Superintendent of the Department of Public Instruction. Deputy to Dr. Loper who has testified before?
A. That's right.
Q. Your own educational background, briefly, Mr. Myer?
A. In 1917 I got my Bachelor of Science degree in mining engineering from the University of Arizona. Then, after following that for several years in Mexico, I went back to the University of Arizona and got my Master's degree in education. I have also studied education at McGill Uni-
[fol. 557] versity in Montreal, Canada, and at summer sessions at the University of Hawaii.
Q. Now, how long have you been engaged in the education or teaching profession, Mr. Myer?
A. For 25 years.

Q. And has all of that been in the Territory of Hawaii?

A. All except two years. The first year I taught was at Tucson, Arizona, Tucson high school in Arizona, and was vice-principal the second year. Then I came down here.

Q. And what positions have you held here?

A. My first position was principal of Hilo high school in Hawaii for four years. Then I was supervising principal of 21 schools on Maui for 19 years. And I came to my present position as assistant superintendent last December.

Q. Mr. Myer, some of your work has been connected with tests and measurements, has it not?

A. Yes.

Q. Calling your attention to "Community Survey of Education in Hawaii," printed in 1941, there is a chapter concerning a survey conducted under your direction?

A. That's correct.

Q. Just briefly, what did that survey cover?

A. In 1940 the department made a survey of the sixth, ninth and twelfth grades of all children in all schools of the Territory, and I was given the job of organizing that [fol. 558] survey, seeing that the tests were given to nineteen thousand children, and then analyzing the data afterwards and interpreting the data.

Q. Can you state briefly your findings concerning the general intelligence quotient at the sixth grade level of the pupils who were tested?

A. It is slightly lower than the mainland norm or the average that you will find on the mainland.

Q. Can you state more definitely than the term "slightly", in a grade placement or age rating?

Judge Denman: This is the sixth grade?

Mr. Flynn: Sixth grade we are concerned with.

A. The intelligence quotient is obtained from a written test or printed test. That was one test that was given. Then there was also given what was called an achievement test, which tests achievement in the skilled subjects such as reading, vocabulary, arithmetic, handwriting and language. And the sixth grade back in 1940 was approximately seven or eight months behind standard.

Q. Behind standard schools here in the Territory?

A. No, behind the average on the mainland for that grade.

Q. Did you state, Mr. Myer, whether that was on the intelligence tests or on the other tests?

A. That was on the achievement test.

[fol. 559] Judge Denman: What is an achievement test?

The Witness: An achievement measures their progress in basic schools, such as reading, arithmetic, spelling, vocabulary, handwriting.

Judge Denman: What credit did you give in that to the ability to speak two languages? What credit did a person get for having in addition to achievement in the English language the achievement of a second language? Was any credit given on that?

The Witness: No, there was no credit there.

Judge Denman: Is that true of all the tests?

The Witness: Yes, that's true of all the tests.

By Mr. Flynn:

Q. Now, Mr. Myer, you stated you were supervisory principal on the Island of Maui?

A. That's right.

Q. For 19 years?

A. Nineteen years.

Q. During the course of that time did you have occasion to visit schools frequently or regularly?

A. Yes, it was part of my duties to visit schools regularly.

Q. Did that include visiting any language schools?

A. No, but as a matter of interest I visited language schools.

[fol. 560] Q. Frequently?

A. Not regularly but, oh, I'd say at least 20 times during the 19 years.

Q. Approximately once a year at least, then?

A. Yes.

Judge Denman: Sometimes Chinese, sometimes Japanese?

The Witness: They were mostly Japanese. I visited the one Chinese school in Maui twice.

Judge Denman: Do you speak Chinese or Japanese?

The Witness: No. I studied Japanese.

Judge Denman: Can you understand it?

The Witness: I can understand it fairly well.

By Mr. Flynn:

Q. Now, in the course of your work on the Island of Maui, Mr. Myer, did you have any occasion to observe in the first four grades children who were at the same time to your knowledge studying foreign languages?

A. Would you repeat that question?

Q. In the course of your work on the Island of Maui, did you have occasion to visit the first four grades of the schools?

A. Oh, yes. The first four grades were regularly part of the schools under my supervision.

Q. At such times did you happen to have knowledge whether any or a large number of the children were simul-
[fol. 561] taneously studying foreign languages?

A. Yes, they were.

Q. Now, did you have occasion to observe whether children who were studying foreign languages had any handicaps or difficulties in their regular school work?

A. Yes.

Q. Did you form an opinion as to whether the study of foreign languages by those children interfered to any extent with their regular public school work?

A. My opinion was that it did and still is that.

Q. That is still your opinion?

A. Yes.

Q. Now, did you have any occasion to notice or observe whether the same children appeared to be subjected to any mental conflicts or confusion or emotional disturbances?

A. Well, my opinion was that in observing children in their language work especially, that there was this conflict, because in visiting classes I have often noticed that teachers were correcting their language and were asking them to use a different type of what could be called a mouth expression in forming sounds than were used in a language school. I even heard that expression used: they should forget what they learned in the language school and listen to what the teacher was saying.

Q. Do you have an opinion as to whether that language
[fol. 562] school attendance and study on the part of the children interfered with the work of the teachers in the public schools?

A. There are no studies that were made in Maui.

Q. Do you have an opinion as to that from your own observation?

A. Yes, I do.

Q. What is your opinion, please?

A. Well, my opinion is that it does interfere with the regular work in public schools.

Q. Do you have any opinion as to the approximate extent or degree of interference?

A. No, I can't give any. I couldn't make any statement on a percentage basis, but I could say that I am convinced that it does interfere.

Q. Now, Mr. Myer, did you have occasion in that same line of observation to note whether the reading and writing were particularly interfered with as distinguished from the speaking on the part of the children?

A. I think the reading was particularly interfered with because we have put a great stress on this question of eye-span, of making a certain number of eye-spans over phrases on each line and not regressing back, and have insisted that a child not go from right to left at all and go back to pick up a phrase but keep moving his eyes from left to right; whereas in the language schools there has been this problem [fol. 563] of going from top to bottom and from right to left.

Q. Now, regarding the interferences you have described, Mr. Myer, have you had occasion to notice whether there seemed to be any resulting emotional disturbances suffered by such children?

Mr. Wirin: Which children?

Mr. Flynn: The children which are studying both the foreign language and their regular English school work.

A. Well, in visiting classes, especially in the primary grades, I have noticed that the child has been, well, put on the carpet very often. For example, we tried to get a child to put his tongue out for the sound "the" and get him to open his mouth on certain vowel sounds, and in the language schools he is taught to speak in a certain way where the mouth is not to be opened in a wide fashion or he is not asked to put his tongue out.

Q. Now, Mr. Myer, in the visiting of the language schools, did you have occasion to notice whether the teaching methods and techniques differed in any way from those followed in our regular schools?

A. Yes.

Q. Will you state what you observed in that connection?

A. For reading comprehension, our schools put a great deal of emphasis on silent reading—and by that I mean a class is asked to read silently and then the teacher calls [fol. 564] on the children and from that finds whether or not the child has comprehended what he has read. And we also put a great deal of stress on the children not all speaking up at once. And my observation in the language school was that there is a great deal of reading out loud all at once, just the opposite idea from what we have tried to inculcate in the public schools.

Q. By that do you mean that in the public schools we try to emphasize individual activity on the part of the student?

A. That's right.

Q. And this is in contrast with what you found to be the technique in the language schools?

A. Yes.

Q. Did you have occasion to notice whether that contrast appeared to have any disturbing influence on the children?

A. Well, it did in the teacher correcting the children in asking them not to speak up in unison.

Q. From that, do you mean that the children were disturbed by that difference?

Mr. Wirin: Objected to as suggestive.

Judge Denman: Yes. Ask him what he meant by it. Don't tell him.

Q. May I ask you what you meant by that statement, Mr. Myer?

[fol. 565] A. Well, I meant that the child has been accustomed to working in school under one condition, then he comes to the public school and is asked by the teacher to work under a different condition, and I think he is bound to be disturbed.

Q. Now, Mr. Myer, with regard to the testing survey you conducted, or any other knowledge you may have from your work, is there any generalized English language deficiency in our primary schools?

A. Yes, definitely.

Judge Denman: Isn't that admitted?

Mr. Wirin: Yes, Mr. Reinecke so testified. No dispute about that.

Mr. Flynn: Well, I want to proceed to the next question. That's the basis, your Honor.

Q. Do you have an opinion as to whether in the past such deficiency has been effected by the study of a foreign language by any large number of the children at the same time they are pursuing their regular school work?

A. It is just my opinion.

Q. Yes.

A. My opinion is that it has.

Q. It has been effected?

A. It has been effected.

Q. Adversely or otherwise?

[fol. 566] A. Adversely.

Q. To any considerable extent or slightly, or what is your estimate in that regard?

A. I will say to some extent.

Q. To some extent?

Mr. Flynn: You may cross-examine.

Judge Denman: Will you pardon me for a question—a for a moment? In your figures that you testified to on these studies, one of them leading to the conclusion that in a certain period of several months behind the standard of the mainland—is there any segregation in those figures of children attending the language schools and those not?

The Witness: No.

Judge Denman: So that your averages there show nothing with reference to whether the language school had caused it, or the segregation of good speaking English students and lesser speaking English students, whether that contributed to it?

The Witness: Well, in the study I segregated them between students going to English standard schools and the regular public schools. There was that segregation.

Judge Denman: What is the difference in standing between the two?

The Witness: There is a difference, there is a difference of a year in some cases and several months in others, depend-[fol. 567] ing on whether it is vocabulary or arithmetic or spelling or handwriting. And my conclusion was that where language was involved, the English standard school is quite a bit higher.

Judge Denman: That's all.

Cross-examination.

By Mr. Wirin:

Q. Now, these tests that were given were given in English, were they not?

A. That's correct.

Q. And so the children who attended the English standard schools received higher ratings or were able to secure higher ratings than those who attended the regular school?

A. That's right.

Q. The differences in the intelligence quotient tests do not necessarily determine the intelligence of the children, do they?

A. That's correct.

Q. They do not?

A. They do not.

Q. Has any study been made to your knowledge in this community as to whether or not when English speaking children from English speaking parents are allowed to intermingle with children from non-English speaking families, whether or not that does or does not have a tendency gen- [fol. 568] erally to raise the English speaking ability of the children?

A. I don't know of any studies that have been made on that.

Q. In any event, it has been the general practice here to segregate the English speaking children from the non-English speaking children by virtue of the maintenance of separate English standard schools?

A. It's been the practice to separate those whose parents wanted them to attend the English standard schools. There are some children in the non-standard schools who speak good enough English to attend the English standard school.

Q. Repeat that.

A. There are some children in the non-standard schools who speak good enough English to attend the standard schools.

Q. By far the majority of the children in the community who speak good English are in the English standard schools?

A. That's ri

Q. Now, during recent years there has been a very strong effort by both the community and the schools to

teach the community generally, both adults and children, English, isn't that true?

A. Yes.

Q. Has any consideration been given as one means of improving the English of the children in the regular schools [fol. 569] of terminating the segregation of the children into schools first where English is well-spoken and into schools which consist primarily of children who do not speak good English?

A. There was legislation introduced to that effect and passed in the last legislature.

Q. To what effect?

A. That English standard schools be abolished, but that did not become law; it was vetoed.

Q. Wouldn't that substantially improve the English speaking level—strike that—If the law which was passed but didn't become law, did become law, wouldn't that substantially improve generally the English speaking level of the children in the schools in your opinion as an educator?

A. I don't know whether the word "substantially" would be correct, because the children would be diffused through many many schools, and they would hear about the same English as they have heard, and the good English they hear comes from the teacher.

Q. Well, doesn't the good English which the children in the standard schools know or speak come also from their English speaking parents?

A. That's correct.

Q. So that if the children in the regular schools have the benefit of listening to English from children with whom they associate, that is, good English, wouldn't that improve the [fol. 570] poor English of the non-English speaking children?

A. It would be a factor in improving it.

Q. Now, you have given your opinion—you said it was a personal opinion—that language schools have been in some part responsible for the so-called English deficiency. Are you familiar with the study of Dr. Symonds on the subject?

A. I have read it.

Q. Do you agree with the findings of Dr. Symonds?

A. No.

Q. Are you familiar with the views of other experts in the field?

A. I have read Dr. Reinecke's study on pidgin English.

Q. Are you familiar with the views of any of the following. I will just read them all to save time. Dr. A. L. Dean, a former president of the University of Hawaii, to the effect that education in the public schools does not interfere with bi-language schools.

A. I have read that report.

Q. You have read his statement to that effect to the Congressional committee conducting hearings? Do you accept those views?

A. No.

Q. Are you familiar with the views of W. Harold Loper, Acting Governor of the Islands—pardon me—are you familiar with the views of W. Harold Loper, who is the [fol. 571] Superintendent, as given before the Congressional committee?

A. I have read his statements in there.

Q. Do you accept his statement there?

A. No.

Q. Are you familiar with the views of Mr. Long, now the Acting Governor and formerly the head of the Department of Public Instruction as given to the Congressional committee?

A. Yes.

Mr. Flynn: If the Court please, I don't like it to be noted in the record as Congressional committee report. Is it the 1935 report?

Mr. Wirin: 1935.

Judge Denman: As I understand it, your contention is whether there is a gradual improvement in the last ten or fifteen years in English speaking? I understand that is admitted.

Mr. Flynn: Well, I think that can be admitted, that there has been some gradual improvement, yes.

Mr. Wirin: Since 1935.

Mr. Flynn: Although I don't think that has any effect on it in any way, on the statement made in 1935.

Mr. Wirin: Well, that's a matter of argument.

Q. Were you going to say something?

A. I was going to say that my opinion is that some of those men have changed their ideas since 1936.

[fol. 572] Q. Do you know whether or not Dr. Dean, formerly President of the University, changed his ideas?

A. I wouldn't care to make a statement to that effect. I said that my opinion is that some of those men have.

Q. Did they change their ideas in connection with the adoption of this law?

A. I think they have changed their ideas in connection with the influence of the Japanese and foreign language schools upon English in our own schools, and upon the instruction in the primary grades.

Judge Denman: Can you tell me how long before 1935 the language schools were introduced here?

The Witness: I came down in 1924 and they were in operation then, and understand they have been in operation many years before that.

Judge Denman: So that the views of these gentlemen in '35 were based upon their experiences during prior years?

The Witness: That's correct.

Judge Denman: And then the martial period in '43 was another factor that was introduced, the war and war incitement.

By Mr. Wirin:

Q. So far as the period subsequent to 1935 is concerned, the only period since then and the present time when the language schools were functioning was from 1935 until 1941?

[fol. 573] A. That's correct.

Q. And the schools were closed by the military authorities the same time they closed the courts, but the courts have resumed since then. Well, now, in connection with the study which you made and which you testified about, in the course of which it appeared, I think, in the sixth grade that there was a deficiency to the extent of seven or eight months in reading vocabulary, and so on, by the children on the Island schools as contrasted with the ratings of children on the mainland, would you or would you not say that the prevalence of pidgin English was a large factor in that deficiency?

A. I'd say it is a large factor, yes.

Q. And pidgin English is widespread among the residents of the Islands generally, isn't it?

A. That's true.

Q. Particularly true of residents where the parents are from other countries like China or Portugal or Puerto Rico or Japan?

A. Yes.

Q. Would this so-called deficiency in reading not be largely due to the fact that languages are spoken at home other than the English language?

A. I think that is true.

Q. That would be true no matter what the language is [fol. 574] that is spoken at home, isn't that true?

A. That's right.

Q. It would be true of Portuguese children as it would be true of Chinese children, wouldn't it?

A. If that language is spoken at home.

Q. And if the language is spoken at home by a Portuguese parent as is as much as by a Chinese parent, this deficiency would be accountable because of the home situation whether or not the children attended any language schools?

A. Not as great a deficiency because there is a great similarity or greater similarity between Portuguese and English than between Japanese or Chinese or some other Oriental language than English.

Q. What about Filipinos?

A. I think the same effect.

Q. As the Chinese?

A. As the Chinese, with one exception: the Filipino language is written from left to right and horizontally. It is not from right to left and vertically.

Judge Denman: Also in the same letters.

A. I'd like to make another exception, that the Filipino inflection is very much like a European language, or I'd say it's more like a European language than a Chinese language. And I can make another statement there, that the Filipinos have also adopted many Spanish words into their language.

[fol. 575] Q. But the amount of deficiency which a child has in English in the schools would be determined very largely upon the amount of foreign language which it gets at home, isn't that true, isn't that right?

A. And elsewhere.

Q. And elsewhere. Now, you say elsewhere. You have made no study yourself in anything like a scientific study of the effects of attending language school upon the ability of a child to know and read English?

A. Well, you'd have to define what you mean by scientific study.

Q. Would you call the Dr. Symonds' study a scientific study?

A. I'm not sure. I'd have to know all the controls he used.

Q. Do you know that both Mr. Long and Dr. Loper considered it a scientific study and so stated it to the Congressional committee?

A. I'd have to get that from rereading the report.

Q. Do you know whether they have changed their minds on that subject from conversations with them?

A. On whether or not it is scientific?

Q. On whether or not the Symonds' study is scientific?

A. I don't know.

Q. Now, about the mental conflict which you observed, [fol. 576] have you observed Hawaiian or Puerto Rican children in the classrooms?

A. Yes.

Q. Have you heard them use pidgin English in the course of their classrooms before the teacher?

A. Yes.

Q. Have you seen or heard teachers attempt to correct them?

A. Yes.

Q. Have they been the victims of emotional conflict under such correction?

A. My opinion is not as great emotional conflict.

Q. Why not as great?

A. Because they haven't been subjected to two schools by the parent. I think that a child when he knows that his parent has asked him to go to two schools, and this conflict is set up because of the two schools, is going to have a different reaction from one when he figures the conflict is just between himself and the teacher.

Q. Now, so far as conflict is concerned, do you agree that it is advisable to create and maintain as close a relationship between the child and the parent, particularly when the child is in early years?

A. Yes.

Q. Doesn't that lead to emotional calm and quiet rather [fol. 577] than emotional conflict for the child to be able to have a community of interest with the parent by being able to speak with the parent in the parent's own language?

A. Yes.

Q. So to that extent there is emotional value in the child being able to speak the language of his parent?

A. Yes.

Q. And there would be emotional value in the child going to a language school so as to better than able to communicate with the parent's own language, wouldn't there be?

A. No, he knows that already. In other words, a child brought up in a Chinese family from the age of one to six knows as much Chinese to converse with his parents as a child brought up in Kansas in English. And he has that security. He doesn't have to get more security in a language school.

Q. Don't you agree that if a child between six and ten goes to a language school and learns more Chinese, he will be better able to speak to his parents?

A. No, he knows enough already. In other words——

Q. How do you know he knows enough already?

A. You can do it by inference. We don't have to send children to our own schools to learn more English to speak with English speaking parents.

Q. Do you think that a child from an English speaking [fol. 578] family at six years of age knows enough English so that he need have no concern nor his parents have any concern about his learning any further English?

A. No, but I am convinced of this, that a child does not need to speak more English if he comes from an English speaking home, say in Kansas or Colorado, in order to get more security at home through his language. He gets that from his parents.

Q. Would your answer be any different if his parents happened to be persons born in another country who cannot speak the English language and who have not yet adjusted themselves completely to the ways and habits and ideas in the American community?

A. No, because he already knows enough of the language of his parents to have that security as far as communication is concerned.

Q. Do you come from a family in which your parents were immigrants into the United States?

A. My father was.

Q. And what country did he come from?

A. He came from Germany.

Judge Denman: You will pardon the question, but is there any difference in the mouth formation of a child taught to speak Spanish by his parents and to speak Japanese by his parents, and the mouth formation he would [fol. 579] use in a Japanese school?

The Witness: I don't think so, because the Japanese school teachers are fluent Japanese linguists; they are Japanese people themselves.

Judge Denman: So that so far as the question of mouth formation, using the tongue and that sort of thing, would be the same in a child at home as would be in a language school?

The Witness: Yes, that's true except the language school tries to give him more of it. And also I was going to say that I don't think the parent keeps harping upon the mouth formation. The parent just accepts the language that the child speaks. But in the school he is given ways and means of forming his mouth to make certain sounds. In fact, they have children holding a mirror before their mouths in order to see the formations. We have them hold a strip of paper before their mouths to make the "th" sound that they don't get in the Japanese school at all. In fact, our biggest difficulty are certain—I mean is the getting of certain sounds because the language doesn't have it in the language school.

Judge Denman: Have you in your statistics any number of cases of recorded neuroses arising from language difficulties as between parent and child and school?

The Witness: No, I don't.

[fol. 580] Judge Denman: No cases at all recorded?

The Witness: No.

Judge Denman: Of neuroses arising from any of these difficulties that you described?

The Witness: No.

Judge Denman: Has any physician made any study of that kind that you know of of neuroses arising from the sort of thing that the statute describes?

The Witness: No.

Mr. Wirin: I just have two more questions.

Q. With respect to the "th" sound, isn't that a sound which many children use, children other than Japanese, or is it peculiar to Japanese?

A. You mean the misuse of the "th" sound?

Q. Yes.

A. Yes, it is peculiar to other groups, too.

Q. So that it includes other groups also?

A. Yes.

Q. You couldn't tell because a child misuses "th" that the child came from a Japanese or Chinese language school, could you?

A. If I heard him speak, I could guess pretty closely, I mean if I heard him speak English.

Judge Metzger: Whether they came from the school or if they came from a home?

[fol. 581] The Witness: Whether they came from a home.

Q. Of course, also, the misuse of the "th" would depend a good deal on how much teaching the child had received at home in the foreign language? In other words, if a child had received rather intensive teaching in Chinese in a Chinese home, his "th" mistakes would be greater than if he didn't, isn't that true?

A. I think of the Japanese in the "th" sound especially.

Q. Well, Chinese. What is the application of your point in Chinese?

A. I don't know whether the Chinese use "th" or not.

Q. Well, this humiliation which the children that you saw and heard because they were reprimanded by the teacher because of their misuse of "th" were Japanese children rather than Chinese, is that correct?

A. Yes, I'd say that's correct. Well, no, I'd say that I have seen Chinese children reprimanded, too, for the use of "th" sound. The statement I made was that I know that the Japanese language does not have the "th" sound.

Q. Now, you say you have seen children reprimanded, Chinese children. You didn't know whether the Chinese children who were reprimanded did or did not go to language school because only a small portion of children go to language school?

[fol. 582] A. That's correct.

Q. And, of course, generally you instruct your teachers to try to avoid embarrassing the children, don't you?

A. Yes.

Q. Their function is to serve the children.

Mr. Wirin: I think that's all.

Redirect examination.

By Mr. Flynn:

Q. Mr. Myer, there has been some discussion concerning children coming from homes where only the foreign language is spoken. Can you make any estimate concerning the number of our children in the early grades in school who come to first grade with either little or no English?

A. I think it is very small now.

Q. Very small now?

A. Yes. It was true when I first came to the Islands 23 years ago. We used to have what was called a receiving grade, and at that time the main purpose of the receiving grade was to teach them to speak English before they went to the first grade. Now we don't have the receiving grade but we are establishing kindergartens.

Q. But you do state that it is a very small percentage?

A. That is my opinion. I don't have figures on it.

Q. Now, reference has been made to the law, the Act [fol. 583] of the Legislature abolishing standard schools which Act I believe you stated was vetoed by the Governor. Do you happen to recall it?

Mr. Wirin: You mean the English standard schools?

Mr. Flynn: The English standard schools.

Q. Do you happen to recall the Governor's veto message?

Mr. Wirin: We object to that. The message is the best evidence.

Mr. Flynn: It's very minor, and I think time will be saved, if counsel will allow me to state it.

Judge Denman: Isn't that a matter of public record?

Mr. Flynn: Yes, it can be that.

Judge Denman: Isn't the record the best evidence?

Mr. Flynn: Yes, it is the best evidence.

Judge Denman: Wouldn't it be put in before this is over?

Mr. Flynn: Yes.

Judge Denman: The wisdom of the Legislature in viewing these English segregated schools, the wisdom of the Legislature expressing something of the truth, and we'll

have the Governor's veto and his message as presenting another viewpoint—that will be the contention, wouldn't it?

Mr. Flynn: No, they are actually going to work out together, the facts I was going to bring out—the veto message said the standard schools can be abolished without the Act. I was going to ask him if he is familiar with the policy [fol. 584] concerning that.

Mr. Wirin: You mean abolishing standard schools?

Mr. Flynn: Yes.

Mr. Wirin: Well, I have objection so much to that that I will have no objection to the witness saying so. That may solve our problem. You will have good English speaking in the community that you won't need to have any legislation against language schools.

Mr. Flynn: Yes.

A. I think that statement is correct, that once we get good English in the community, there would be no need of English standard schools. And we had a slogan among ourselves for years, "Every school an English standard school." So we have worked in the non-English standard schools on that basis, that we are going to try and we are trying very hard to make all schools English standard schools, not by designation but in fact. Now, then, as far as abolishing English standard schools by department regulations, there is no policy on that at the present time. I mean that would have to be by act of the Commissioners of Public Instruction.

Mr. Flynn: I'll pursue that further.

By Mr. Wirin:

Q. You have already stated that in your opinion there would be some slight advantage at least in improving [fol. 585] English among children generally if those who now attend the English standard schools attended the regular schools, and both non-English speaking fluently and English speaking children were placed together?

A. Yes, because the way to improve better English is to hear better English.

Judge Denman: Take this situation, Doctor: Here are five children in the class. How large is a class?

The Witness: About 32.

Judge Denman: Five children in the class that speak excellent English. The remaining 27 are in all shades of correct expression. Now, when called upon to recite in the classroom, it is obvious that these five will be most likely using good English.

The Witness: That's correct.

Judge Denman: And just cut into the ears of the other children, the clear language and good English of the five, no matter whether or not in the playtime those English children slipped into pidgin English. I mean that is substantially what might happen.

The Witness: That would be true if all our present English standard pupils went to public schools. But I think if the English standard schools were abolished, many of them would go to private schools.

Mr. Flynn: I have no further questions.

[fol. 586] Mr. Wirin: May I have one more question, your Honor?

Recross examination.

By Mr. Wirin:

Q. There are, of course, many instances in the schools when teachers reprimand children for other than misuse of the phrase "th"? For instance, if a child doesn't have a lesson well done, the teacher reprimands or calls attention to that fact to the child. Doesn't the teacher do that?

A. Not in the same degree, because all children go through this experience of not having their lessons at certain times.

Q. Do you mean the mistake in the handling of the phrase "th" is more serious in the schools than failure to pass a lesson and hence calls for a greater reprimand?

A. I think it does, because one of our main emphases is on English, and the "th" is just one example. We have others.

Q. Of course, the primary objective of the educational system here is not merely correcting "th" or even the English language. The primary purpose is to build good citizens, isn't it?

A. But you can't have good citizens unless they can read. I mean if no one in this Territory couldn't read, we wouldn't have very good citizenry. I mean if no one could read.

[fol. 587] Judge Denman: Is there any question in this case of children that can't read after being eight years in the school? I mean any of them.

The Witness: They have difficulty reading, some of them.

Judge Denman: At the end of eight years?

The Witness: Some of them.

Q. Are they allowed, if they can't read, are they allowed to be promoted if they can't read?

A. They are retarded in certain years. But we have a policy—it's just a policy, it's not a rule or regulation—that we don't retard a child more than one year in any one grade.

Q. Were you here when Dr. Loper testified?

A. Yes.

Q. Did you hear him testify that it is the practice not to promote a child unless the child also passes English?

A. I don't think he said that.

Q. He didn't?

A. No.

Q. Is that not the fact?

A. No.

Q. It is not the fact?

A. No.

Q. In other words, the child is promoted even though [fol. 588] it may fail in English?

A. I didn't say that.

Q. Well, then, I am confused. Will you straighten me out?

A. Our policy is that a child is not promoted if he doesn't make improvement in English. There is a big difference there. If he fails in English, he's not promoted except in very unusual circumstances.

Q. In other words, a child is promoted if it receives a passing grade in English, and that's determined by the teacher?

A. No, that's only one criterion. He may received a passing grade in English but fail in all of his other subjects. Now, that is not conceivable but it's possible. In that case I don't think he'd be promoted, I don't think. But again that is on the teacher. It would depend on the individual child in that case.

Q. In other words, the teacher makes the final decision?

A. Well, in extreme cases where there is some doubt like this one, she'd consult the principal or even the supervising principal.

Mr. Wirin: All right. I think that's all.

Judge Denman: Now, Doctor, what percentage of these Hawaiians seeking statehood, what percentage of the chil- [fol. 589] dren reach 15 years of age who can't read intelligently?

The Witness: I'd say it's a small percentage.

Judge Denman: Well, is it a half of one percent?

The Witness: Well, this is an estimate now but I'd say one percent.

Judge Denman: One percent? The language difficulties of these would be the extreme cases, of course. One percent of the school population at 15 years of age can't read newspapers, is that correct?

The Witness: Yes. May I make one more statement to clarify that? That, in my opinion, or in the discussion of my opinion, based upon the interference with reading, of the reading of the Oriental language, I think that it would be to our advantage if we had children who read better, even though they read well enough to read newspapers and magazines, that they can read better than they read at the present time.

Judge Denman: Well, of course everybody will agree with you on that. But here is a question, I mean here is a question of the Constitutionality of an Act and the question of degree. On that question I understand you to say only one percent can't read newspapers at 15 years of age after going through school, is that correct?

The Witness: Yes.

Judge McCormick: I want to ask him a question before we leave that. (To Mr. Wirin) You can follow it up now. [fol. 590] Mr. Wirin: Well, I'll yield to you, Judge, and follow you, or shall I go ahead?

Judge McCormick: Yes.

By Mr. Wirin:

Q. As a matter of fact, it would be a very rare case of a child who wasn't able to read at 15 years of age, because that child, being unable to read, would not be promoted, would it? You wouldn't promote a child through the grades if he was unable to read English, would you?

A. We'd promote him in special cases, in special classes where you have children of that type in one class.

Q. Well, he'd be a child who is probably of very low mentality anyway?

A. That's right.

Q. And that would be true whether or not he attended any language school, wouldn't it?

A. Yes, but my opinion here now was that this difficulty in reading sets up a conflict in the child. And I think that is the disadvantageous thing.

Q. You don't suggest that this conflict results in a person being a moron or an idiot so that he has to be in a special class and ultimately can't even read a newspaper, do you?

A. No, I think it is harmful to a child to have these conflicts set up in himself.

[fol. 591] Q. Yes, but the point is that the child who at 15 cannot read would be a special child of low mentality who is in a special class?

A. These would not have the conflict. It is only the bright child that has the conflict.

Q. Oh, it's acknowledged in education that a certain amount of bright children, intelligent children, and good citizens have a certain amount of conflict?

A. Yes, but it's not our purpose to give them conflicts. We all have conflicts.

Q. Well, this matter of mispronunciation of "th", do you think that causes serious conflict in a child?

A. I do. I have observed it.

Judge McCormick: Mr. Myer, I want to ask you a question or two on this issue of emotional disturbance of a pupil. Is there any material that shows that in the same family, for instance, children from birth to ten years of age, some of those children are attending the English standard school and some attending the regular public school?

The Witness: In the same family? Yes, that's true.

Judge McCormick: Has that existed to any substantial extent?

The Witness: No, to a small extent. And it's *because* not by the parent, but by the school itself, because on some of the outlying islands we have had only a certain amount [fol. 592] of building space in the one standard school, and it's limited to the size of the classes. So it might be that we have room for only one first grade and 60 might apply.

We take 32. And one of the children who has been denied admission because there was no room would have to go to a regular public school might have an older brother, say, in the sixth grade..

Judge McCormick: Well, these Japanese or Chinese families, they are rather large families generally as compared with other ethnic families, are they not?

The Witness: Not the second generation. It's smaller than the hnole group.

Judge McCormick: Well, has there been any noticeable disturbance there on the part of both children of the same family, in the same age group, because some of them attend the English standard schools, and others attend public schools?

The Witness: Great disturbance. In fact, it is quite a serious problem. And the parents have objected strongly that both children, if there were two involved, should be in a standard school. And I am thinking of parents of Japanese ancestry.

Judge McCormick: I believe you said that as a result of that public clamor and sentiment and opinion that the Legislature passed a law abolishing standard schools but the Governor vetoed it?

The Witness: I couldn't make a statement as to why the [fol. 593] Legislature passed it.

Judge McCormick: Well, I am not asking you to do that. But I am asking you for the fact. Have I stated the fact?

The Witness: That there are in certain cases, there are families where one child is in the English standard school and one in the non-standard? That's correct.

Judge McCormick: That is quite a disturbed family?

The Witness: It is.

Mr. Flynn: I'd like one more question, if the court please.

By Mr. Flynn:

Q. Mr. Myer, the language schools have been closed since December of 1941. Do you have any opinion formed in the court of your work in the last six years as to whether there has been any improvement in the language situation in the primary grades?

A. I am convinced there has been. Now, it's too bad we didn't test the third grade back in 1940. We didn't. We tested the sixth and twelfth. And this past school year

Dr. Church of our department, head of the tests and research division tests, tested the third, sixth, ninth and twelfth. But my opinion is from observing classes almost every day in the course of my work as supervising principal in Maui, that there has been a marked improvement.

Q. In the entire primary grade level or do you have in [fol. 594] mind any particular region of the primary grades?

A. I was thinking particularly of the first six grades.

Q. The grades after that being elementary—I mean intermediate?

A. Yes, junior high school and high school.

Q. It's your definite opinion, then, that in the first six grades there has been a definite improvement?

A. Yes.

Judge Metzger: There has been an improvement throughout the preceding years from year to year?

The Witness: Yes, that is correct. In the "Community Survey of Education", in which my study was printed, there was a comparison there of 1940 with a study made in previous years by Dr. Wiley, who is now on the mainland in Indian service. He was head of our research division at that time and he showed there had been improvement.

Judge Denman: In other words, really it is a continuing improvement, as the old people die off and the parents become the second and third generation Americans?

The Witness: That is true. But I think there has been greater improvement since 1940.

Judge Denman: Well, now, what figures have you to sustain that viewpoint?

The Witness: Well, I said, what I meant to say, that was opinion, because I have been interested in this language [fol. 595] problem. I felt that English was one of our big problems in school, and we have hammered at it and hammered at it, and I have observed it carefully.

Judge Denman: Well, in that period was the relative increase in second generation parents of these four classes outstanding?

The Witness: It's very great. In fact, in my opinion the great majority of the children from Japanese homes come from homes where they don't need the Japanese or Chinese language to communicate with the parents. They use English.

Judge Denman: Well, that, of course, is a growing thing and would reach a maximum point when all first generation, one foreign language parents, disappear?

The Witness: Yes, I believe that.

Judge Denman: Haven't you had another factor in the last six years? That is what I call the martial factor, the stimulation of the teaching of English due to war conditions. I understand here during the war there was a great campaign for English education. Now, in your opinion, is that a part, did that play a part in this change?

The Witness: Not in our schools. Well, I should say this, that the community put on this campaign as well as the schools. There were placards in busses, "Speak American", and in restaurants and stores. But our emphasis in the schools has always been on "Speak Better English" even [fol. 596] before the war.

Judge Denman: Would it or would it not be your opinion that the stimulation of the entire community would have a reaction on both parent and child——

The Witness: I think that is true.

Judge Denman: — and lead to an increase in the use of good English in the schools?

The Witness: In fact, many of the Japanese immigrants during the war asked to have English classes for them so that they could learn English, and that was done.

Judge Metzger: Has there been a progressing proficiency in the school service from time to time?

The Witness: That is true.

Mr. Wirin: May I have two more questions?

By Mr. Wirin:

Q. During the war there was also in this community a large influx of soldiers who spoke English, and also a large influx of haole workers, defense workers?

A. Yes.

Q. The entire community was pretty much English-minded? And you would agree that that percolates down to everyone in the community, both parent and child?

A. That's right.

Q. One more question. It is a fact, is it not, that there has been no immigration of Chinese, Japanese, into this [fol. 597] community, or any community in the United States, since 1924?

A. That's right.

Q. So that, as Judge Denman suggested, that the older alien or Oriental population is dying off and the remaining Oriental population consists of persons who were born in the United States?

A. Yes. And that means, too, that in effect the children in the first four grades don't need a foreign language to communicate with their parents.

Q. It also means, doesn't it, that probably there will be less demand by Chinese and Japanese ancestry parents to send children to language schools?

A. It depends on the pressure put on them.

Q. On the pressure put on them by whom?

A. By people who want the schools.

Q. Don't the public schools put pressure to secure large attendance?

A. No, that's determined by law.

Q. Of course, the public schools are put on a larger amount of pressure to teach English?

A. Oh, yes. We put great pressure on the teaching of English.

Q. You don't think that English is such that it has a sanctity or a position which other languages do not have, [fol. 598] do you?

A. It does in our country, because that is our language.

Q. Don't you understand that in our country persons can speak the language they desire so long as they don't say disloyal or profane things?

A. If they speak English first, I will agree with you.

Q. In other words, you would require by law that persons speak English before they could speak any other language?

A. No, I didn't say that. I said I thought a good American citizen should be able to speak English and good English.

Q. Do you agree——

Judge Denman: I think we are getting a little far afield.

Mr. Wirin: That's all.

Mr. Flynn: I have no further questions.

(Witness excused.)

Judge Denman: We'll take a recess for ten minutes.

(A short recess was taken at 10:15 a. m.)

After Recess

OREN E. LONG, a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Flynn:

Q. Your name is Oren E. Long?
[fol. 599] A. Yes, sir.

Q. And you are presently the Secretary of the Territory of Hawaii?

A. Yes, sir.

Q. And the Acting Governor?

A. Temporarily, yes, sir.

Q. And just briefly, Mr. Long, what was your profession before you were affiliated with the Territory as the Secretary?

A. I had been in school work practically my entire life.

Q. And just briefly your own educational background?

A. My elementary and a part of my high school work were in the public schools of Kansas. Then I attended the private school at Knoxville, Tennessee, a small academy, a church academy. I took a part of my college work there, part of it at the University of Tennessee, and a degree from the University of Michigan, and later on took a little over a year's graduate work in education at Columbia University in New York.

Q. Now, Mr. Long, please, a brief account of your work in the field of education?

A. My first experience was in a private school on the high school level as a classroom teacher for two years; then for an additional three years in that school, a combination [fol. 600] classroom and administrative position, that is, I was principal of the academy. Following a short period I then became a classroom teacher at McKinley High School in Honolulu. Later on worked in a private school near Philadelphia for two years. Then returned to the Territory in the fall of 1924 to become principal of the Kauai High School, which also had an elementary school section, grades one to eight. After a single year there I came to the central office of the Department of Public Instruction where I served nine years as deputy superintendent, and then

slightly over twelve years as superintendent of public instruction.

Q. Now, Mr. Long, from your experience here in the Territory, do you have any opinion as to whether there is any generalized English deficiency in our public schools among the students?

A. On the basis of my experience here as compared to my experience on the mainland as a student and teacher, I should say we have a speech problem or a general English problem here that is peculiar to Hawaii, not that other communities do not have speech problems, but ours is a peculiar problem, somewhat different.

Q. Would you express an opinion as to the degree of that problem? Is it slight or great?

A. I'd say it's considerable. I think the influx here in the past of rather large numbers of immigrants, as they were [fol. 601] called at that time, in relation to the total population, with the result that they tended to keep their own group so far as their home life was concerned more or less intact — I think that has been perpetuated in our society here a little more than it was, we will say, in the upper Mississippi valley where certain European groups came in, like the Scandinavian people and the Germans. That is, I think that tendency to maintain the old country status, I think it disintegrated there a little more rapidly, considerably more rapidly than it has here.

Q. Mr. Long, do you have any opinion as to or concerning the value or lack of value of foreign language study on the part of children in the elementary grades in school?

A. I have an opinion on that.

Q. Will you express it, please?

A. While I recognize the desirability of people, any people, having a knowledge of more than one language, on the basis of my experience and observation and my knowledge of trends in the public and private schools of the United States, my opinion is that it would be in the best interest of the children not to start them at the same time in the study of their own language, that is, the English language and in some foreign language. That becomes objectionable to the extent that the elements of difference, of differences, are present. That is, if it is a study of a European language [fol. 602] where the alphabet used is the same one that they are becoming increasingly familiar with as a tool in the regular school, the objection would not be so great as in a situa-

tion where they were using characters in an entirely different set-up. That is my opinion.

Judge Denman: May I interrupt to ask a question?

Mr. Flynn: Surely.

Judge Denman: In the framing of the statute if it were based upon that particular thing, that would present a problem that you are now describing, wouldn't it? Say that a statute read "languages which require a different alphabet and a different movement across the page from the European languages should not be taught in this early or adolescent period."

The Witness: That's true.

Judge Denman: Now, that is really, as I understand it, the substance of your objection. It is confined to this area of language of a different alphabet and a different method of crossing the page primarily.

The Witness: Not entirely. But primarily that must be the answer to it.

By Mr. Flynn:

Q. Mr. Long, you stated that you believe it to be in the best interests of the elementary grade pupils that they not take up the study of a foreign language at the same time they are beginning their work in the elementary schools, is [fol. 603] that correct?

A. That's correct.

Q. Do you have an opinion as to whether the taking up of the study of a foreign language at that time has any harmful results upon such student from the standpoint of any mental conflicts or emotional disturbances?

A. My opinion is that that has considerable possibilities with some of the children, not all children, but certainly with those who are having rather a difficult time in making reasonable progress in their English studies, their speech. It seems to me it is inevitable that after a part of the day in a school with a certain atmosphere, certain methods, using the English language, having the beginning books, the primer introduced, with the established or traditional arrangement of the words, the sentences, for small children, then to go for a period of time the same day to a school where the atmosphere is different, that is, the whole set-up, where the differences are so great in the materials used, it

seems inevitable to me that there would be a considerable degree of confusion there.

Q. Now, Mr. Long, from your own observation in educational work here in the Territory, do you have an opinion as to whether the study of foreign languages by children in the primary grades has interfered with the progress made in our schools, public schools?

[fol. 604] A. If I may break that down—we have an overall purpose in our tax-supported American school system, that of developing the good citizen, proper understanding, and all that. It has been my opinion for a good many years, and I have so stated to the various statehood committees that have come down here, that the work of the language school has not to any great extent interfered with the growth of American citizenship and understanding of American institutions and of American ideals. It may to an extent but I believe it is only a slight degree. Now, when it comes to general academic progress, the interference would not be very great. The field where I think it would be greatest is in the field of speech, and to the extent that it gets in the way of a mastery of English it would to that extent, of course, have a bearing upon progress in the general subject matter field, that is, if it has any bearing upon reading comprehension, then it would tend to lessen somewhat the progress in science or social studies or literature or any other field. I think it is in the field of language that the real problem exists.

Q. Now, with regard, Mr. Long, to the opinion you have expressed concerning some mental confusion, some emotional disturbances probably caused to the children in the elementary grades by a study of the foreign language at the same time, and likewise with regard to whatever retardation there might be in the regular academic work, do you [fol. 605] think that those handicaps or undesirable results would be lessened if the teaching of the foreign language to the children were to be postponed, for example, until they had passed the fourth grade in their regular school work?

A. I feel that way. I have felt that way for some years. I have been influenced by statements that I have had from a great many classroom teachers where it was an opinion only, let us say, but nevertheless an opinion that became accumulative. I have been influenced by the well-known

trend in the private schools, the highly select schools, to place the teaching of French a little later in the child's experience than they did formerly. Even where they are now offering French in the lower grades, a thing that used to be done at Punahou but is not done now in our own community, there they didn't place before the child what we call a first reader in French. It was mostly an emphasis upon getting the right sound, the correct pronunciation, and the actual study of it came at a later period. Going back to one of my first statements, I recognize the desirability of having a knowledge of more than one language. I think that is very desirable. I think mastery of it or desirable mastery of it will come just as well, as seems to be the belief now of schools both public and private, will come just as well later. And I hold the additional conviction that by putting it back—our law says four years—I don't [fol. 606] know as anyone could make a case that that is exactly the correct place, but about that period, by putting it back there it does away with the possibility of interfering with reasonable growth in the use of English in a community like ours where that is recognized as one of our great problems.

Mr. Flynn: You may cross-examine.

Cross-examination.

By Mr. Wirin:

Q. Governor Long, do you have with you your testimony before the Congressional committees in connection with statehood?

A. Yes, I do. I have both of those volumes.

Q. Were you advised since yesterday that Dr. Loper was inquired into so far as his testimony before the hearing, before the Congressional committees, was concerned?

A. Yes, I was told that references were being made to that.

Q. Since then you have examined your testimony which you made?

A. Yes, I went through it rather carefully.

Q. Now, since you have copies I might just refer to the document and the page number and perhaps we will both save time.

A. Yes.

Q. I refer to your testimony beginning as of page 78 of [fol. 607] "Statehood for Hawaii" on H. R. 3034. (To the Clerk) May I have these marked for identification? Perhaps it will be better for the record. Governor, do you also have the hearing on "Senate Concurring Resolution 18"?

A. Yes, I do.

The Clerk: H. R. 3034 will be Plaintiffs' Exhibit 1 for identification.

Mr. Wirin: And the next one for identification will be Senate Concurring Resolution 18.

The Clerk: Senate Concurring Resolution 18 will be Plaintiffs' Exhibit 2 for identification.

(The documents referred to were marked "Plaintiffs' Exhibits 1 and 2 for identification" respectively.)

Mr. Wirin: There is no objection to these being offered in evidence, so I will do so and they will be also in evidence.

Judge Denman: Yes.

Judge McCormick: Mr. Flynn, you don't have any objection?

Mr. Flynn: No, except that for a practical difficulty I know counsel will have to return those to their sources, so we will have to have copies somewhere.

Mr. Wirin: May they just be mraked for identification and we will offer substituted copies when we make our peace with the local library.

Q. Now, in connection with your testimony on H. R. [fol. 608] 3034, which appears in Plaintiffs' Exhibit No. 1 for identification, on page 78 you will recall that you testified as a representative of the school system and that you said, your testimony being given in behalf of 2,723 public teachers in the Territory, and that what you testified reflected pretty accurately their attitude, do you recall that?

A. That's correct.

Q. Do you recall a little bit later on the same page stating in substance that the pupils in the schools, from your contact with them,—you were answering the second question—will you help me out and tell me what you are telling there?

A. That was the general statement, Mr. Counsel, introducing the topic. I said there are two very important questions involved in statehood. These are, first, have

the people of Hawaii the general intelligence and the ability to meet successfully the problems that would confront them under statehood? And second, do the citizens have a reasonable understanding of American institutions? And are they loyal to those institutions?

Q. You answered both of those questions in the affirmative?

A. Very positive in the affirmative at that time.

Q. Then on page 81 you stated in effect that the youth of Hawaii have a growing appreciation of American insti- [fol. 609] tutions, are conscious of their citizenship.

A. That's right.

Q. And that they are good Americans.

A. Take pride in their citizenship. I also added that.

Q. Now, that statement speaks for and includes the graduates of the schools of Hawaii, whether or not they are of any particular race and whether or not they attended any language schools, isn't that true?

A. That is correct.

Mr. Flynn: If the Court please, maybe we can save some time on further stipulation, that the loyalty of the students is unquestioned.

By Mr. Wirin:

Q. And thereafter did you furnish to the committee statements of six educators?

A. I did.

Q. Pertaining exclusively to the relationship of language schools and citizenship and language schools and retardation?

A. I submitted those statements. If I may refer to another factor in the record, those statements had been prepared back in 1932. They were used in 1935. That is brought out here in the beginning of that paragraph. The second thing that I would like to stress was that these opinions, while they may have mentioned other things—but [fol. 610] I am reading—"These opinions as to the possible effect of the Oriental language schools on the Americanization program, in my opinion, are representative of people generally." We were not discussing language. We were discussing the general Americanization trend that we hoped was going on.

Q. Now, Governor, were these statements by the six educators, statements by the leading educators in the community on the subject which the statements were purported to deal with.

A. Yes. I should say they were not necessarily the leading but among the leading, and perhaps the leading from the standpoint of position.

Q. Now, referring to page 82, did the statement by Dr. Dean, former President of the University of Hawaii, recite among other things that education in the public schools is not interfered with by the language schools?

A. I think that was his statement.

Q. Was that also your view in 1936 when you submitted to the committee the statement of 1932?

A. Not necessarily, as a number of statements in here show. I said there is a big question in my mind and at the same time I pointed out that many teachers in relation to the language problem would likely give a more positive statement than I gave. That is, I have those places marked if you wish to have them in the record.

[fol. 611.] Q. Well, did you anywhere in the record dissent from the views of Dr. Dean to the effect that the education in the public schools is not interfered with by language schools?

A. No, I believe thoroughly, as I have stated this morning, that any interference with loyalty, to my way of thinking, then and since would be almost imperceptible. It might interfere with general scholastic progress or academic attainment, particularly in the field of language and speech.

Q. Yes. Referring particularly to the matter of interference, if any, by language schools with education, namely, item "f" on page 82 of Dr. Dean's statement, that education of the public schools is not interfered with by the language schools, did you anywhere express an opinion to the contrary?

A. No, I did not discuss these at all. The statements are not read. They were submitted for the record at that time.

Q. Calling your attention to the testimony or the statement of W. Harold Loper which you furnished to the committee and which appears on page 82, you notice that Mr. Loper's statement refers to a study by Professor Percival M. Symonds?

A. Yes.

Q. Are you familiar with the study?

A. Yes, very familiar with that.

Q. And Mr. Loper in the statement which you submitted [fol. 612] states that that is the most, if not the only authentic study upon the subject. Did you accept that view when you submitted that statement to the committee?

A. Yes, with a slight qualification of its being the only one, because in my testimony I referred to two such statements but I referred primarily to Dr. Symonds rather than the other one.

Q. You recognized that Dr. Symonds' study when you testified is the most authentic and scientific?

A. Up to that time I think so.

Q. You also submitted the testimony of Dr. William H. George, Dean of the College of Arts and Sciences of the University of Hawaii, is that right?

A. Correct.

Q. Calling your attention to page 82 to his statement: "Every child should know two languages, the language of its nativity and another. It would be a distinct cultural loss if our young American citizen of Japanese ancestry were to neglect the language of their fathers. So valuable is this training that a goodly number of occidental children have taken advantage of it."

"I wish to go on record, therefore, as favoring the Japanese-language schools in Hawaii."

Do you anywhere dissent from that statement of Dr. George which you submitted to the committee?

[fol. 613] A. I did not either approve or dissent from any of these statements as the record will show, except to this extent: In the introductory statement at the time they were submitted for the record I stated that in my opinion these statements were representative—I think is the word I used—yes, representative of most of the people of Hawaii. Now, the whole thought there, the first part of that sentence is centered around this question of citizenship and loyalty, you will note from the record there. There are statements in these, particularly the one from Mr. O. W. Robinson, who is Director of Curriculum, that appears on page 85 where he says that the effect upon the child's health and emotions is highly questionable. In neither approved nor objected to that statement. I was submitting the viewpoint of six men whose opinion in the main would

be accepted as rather valid in relation to Americanization and loyalty.

Q. Well, these statements in addition to dealing with Americanization also in part at least dealt with the effect of language schools?

A. That's correct.

Q. Upon education. And dealt with the question of the retardation as claimed by some persons, and alleged retardation in the English schools, allegedly due to language schools, isn't that right?

A. Possibly one could read that into the statements. [fol. 614] I am not entirely familiar with it because for the preparation of these statements in 1932. I know this, that the thinking of people in the field of education in the past 15 years—and these we must keep in mind were prepared 15 years ago—on the basis of the studies that have been made of child development, has changed considerably, that is, it is a science. And convictions of 15 years ago would not necessarily be valid today, nor would necessarily be held by the same people.

Q. You submitted this statement in 1935?

A. Yes, in '35.

Q. You believed at that time they were statements representing the best thinking among educators on the subject?

A. Yes, I would say at that time they were available. I'll put it that way.

Q. Have any studies been made in Hawaii since 1935 which causes you to change any of the views expressed or submitted from educators to the Congressional committee?

A. There have been a number of studies, particularly the work of Dr. Madorah Smith. She has done considerably in this field as have certain others. I think the trend has been towards questioning more and more the advisability of having people, young children, pick up the two languages, the formal study at the same time.

Q. Dr. Smith has been conducting studies in the field for many years, hasn't she?

[fol. 615] A. Yes, she has.

Q. As a matter of fact, her most authentic study was completed in 1932, three years before you submitted the statements of the educators to the Congressional committee?

A. Possibly so. I would not be able to say that that was the most authentic. I think that was one in a series of studies that she made.

Q. What study has she made subsequent to 1935, to your knowledge?

A. I couldn't give the material on that.

Q. Are you familiar with the study entitled "The Direction of Reading and the Effect of Foreign Language Schools' Attendance on Learning to Read", which appeared in the Pedagogical Seminar and Journal of Genetic Psychology in 1932?

A. I am not. I probably was but I am not at this time. It doesn't mean anything specifically to me.

Q. Well, did you have in mind, can you tell us any study of any person which came to your knowledge subsequent to 1935 which causes you to have now a different view?

Judge Demmin: In the Chinese and Japanese schools?

Mr. Wirin: Even in this general field. I am perfectly willing for the moment to have the question as broad as that.

Q. And if you know of any study on the effect of language schools and relationship to education, I would ap- [fol. 616] preciate if you will tell us that?

A. The material that I have in mind, leaving now the studies of Dr. Smith, has centered around the studies that had been made by community groups, particularly the study under the direction of Miss Elizabeth Collins that we referred to as the "Community Survey of Education". Now, the discussions in the committees at that time recognized that this is a problem along with other problems. There has also been agreement that it was not as big a problem to the classroom teacher who was working or even agonizing over the problem as the language pattern of the entire community referred to generally as pidgin. The influence of the language school was one factor only. And I have heard that brought out repeatedly in committee meetings. I heard it referred to a great deal at the time this statute under consideration was passed. In my testimony in 1935 in two places I referred, when I refused to give a positive statement that I thought it was detrimental, I said I am inclined to think that it is—I did state that a great many classroom teachers working directly with the children in relation to the question of—I think it was about general progress in the school—I stated there that I thought a great many classroom teachers would disagree with me and make a more positive statement. Now, I am basing my

statement somewhat on innumerable conferences with teachers who had actually been working with the children, whereas as an educator I was not working with them.

[fol. 617] Q. Of course, you had numerous conferences with teachers prior to 1935 in connection with the whole problem?

A. Oh, yes.

Q. And the language schools have been closed since 1941?

A. Yes.

Q. Now, let's turn to your testimony on a later date in 1937, and I refer to Plaintiffs' Exhibit No. 2 for identification, at page 329.

A. 329?

Q. Yes. You were discussing the Dr. Symonds' study, and you stated to the committee, did you not, about the middle of the page concerning Dr. Symonds,

> "He found, so far as the language school is concerned, that there was apparently no effect on the English problem in the public schools."

Did you, anywhere in the course of your later of former testimony before the Congressional committee on that occasion dissent from that opinion of Dr. Symonds?

A. In the same statement it has that same answer; I made that statement in reply to this question:

> "I would like to ask you if in your schools you experience any difficulty with children who attend the language schools, which makes them more difficult to instruct than those children who do not attend the language schools?" "Answer. That is a difficult ques[fol. 618] tion. There is a difference of opinion."

Now, I was thinking when I stated "There was a difference of opinion" of the fact that many teachers working with the problem would disagree with me. I think it is on the next page that I refer to that. Then I went ahead and presented the most valid, scientific study that had been made, which was the one that you referred to, and I did not take issue with it, answering your question, as I presented it for the record as a matter of fact.

Q. Well, let's turn to page 330, Governor:

> "Question. Taking a dozen of your students, or those who have come under your influence and instruction,

who have attended the Japanese language schools and a dozen who have not attended the Japanese language schools, do you see any difference in their scholastic attainments, or the rapidity with which they assimilate information given them by their teachers?

"Answer. My impression is that there is no difference."

You so testified?

A. Yes. I testified at that time. Of course, when you take a concept of a dozen here and a dozen there, I think it's a fair question. There had been no such observation on my part. I had an impression that there was no particular difference there, still thinking of the purpose of that [fol. 619] committee, which was not to check on the mastery of English or the mastery attained, or lack of mastery attained in the Oriental language schools. The sole interest of that committee at that time was this question of citizenship and loyalty. Now, if I may refer back to the other section——

Q. Surely.

A. —I answered that question by stating that there was definitely a difference of opinion. I then referred to Dr. Symonds' study and then the next to the last sentence of that section, that is, after I had stated that he found, as you read, that apparently there was no particular difference, then this appears, my statement:

"The idea is held, even among teachers, that it does add to the language problem."

You see, at that time I made it very clear that there is a big question in my mind on language. And in another place I said, where I refused to make a positive statement, I stated that I thought many classroom teachers working with children would—and here again I made it clear. Now, I base that on contact with these teachers who were up against the job daily.

Q. Now, Governor, look at the bottom of page 330, and you were asked the following question:

"Question. By and large do you find that the knowledge of the Japanese language, imperfect though it may be, [fol. 620] obtained during that one hour of schooling in the Japanese language school, interferes in any

way with their progress and instruction in the public schools?"

And did you answer:

"Answer. I feel like it does not."?

A. I was thinking of the over-all problem. Now, I undoubtedly had speech in mind to an extent because the next part of it, as you will notice, deals with pidgin English as a greater problem. But all through I have recognized, that is, my testimony will show that I recognized that there was in the minds of teachers some basis for thinking even 13 years ago that it had a bearing on our speech problem.

Q. Now, after saying I did not, after saying the language school has no effect on the progress in the schools, did you then explain that pidgin English——

"The pidgin English, which they resort to on the street, playground, and parks does interfere. We have to break that down, but the studies made, that I referred to, seem to indicate that there is no particular basis for feeling it compromises their ability or lowers their scholastic efforts."?

You were referring to the studies of Dr. Symonds and Mr. Schwartz?

A. Yes, I was.

[fol. 621] Q. Now, one or two more questions. You recall at page 331 comparing the situation in the Islands with the situation in the New York east side district where there is a large immigrant population? And you were asked and did you testify:

"Now the quality of the English spoken varies greatly, just as it does in the New York east side district, and certain sections of Boston."

That's on page 331, about the middle of the page.

A. Yes, I found that. I was just getting the introduction to that. I just stated that at that time a great many of them came to us as Japanese, as their mother tongue, but the number was decreasing all the time and was less true with the passage of time.

Q. Well, finally, were you asked the following question about the middle of page 331:

"Question. Do you find that there is a difference in the first and second generation children attending school, as to the quality of English they speak?

"Answer. Yes; there is a difference. Their language is improving all the time. There is still a problem in the matter of speech, but we do not accept the statement that it is our greatest problem. I think the building of character, and the right attitude, is the greatest problem."?

[fol. 622] A. Yes, that is correct.

Q. And that would be your testimony today?

A. Yes, I made that statement at the beginning of my testimony.

Q. And you were asked is there an improvement and you said there is, very decidedly?

A. I would like to point out that in that statement I used also this:

"There is still a problem in the matter of speech."

That is, I recognized all through that that was a great problem, and I accepted it only because of this general concept to the underlying purpose of the tax-supported school, the building of citizenship and character.

Q. You explained to the committee, did you not, that the reason for the problem was primarily pidgin English?

A. Yes.

Q. When it was used on the streets and playground?

A. Yes, many times I have done that, because it is a conviction and is still a conviction that that is our greatest problem.

Q. Now, the problem as to English in the schools is getting less and less all the time? I mean English is improving all the time, isn't it?

A. Correct. I hope that and I have basis for my hopes.

Mr. Wirin: That concludes my examination.

[fol. 623] Judge Denman: Governor, do you read Chinese?

The Witness: I do not.

Judge Denman: Then you wouldn't be able to testify one way or another whether in the making of character, reading

of ancient or modern Chinese literature would play any part in the children coming from parents already molded by Chinese culture? You wouldn't be able to testify to that?

The Witness: No, I don't think I should. I haven't the background for that.

Judge Denman: That's all.

Mr. Flynn: I have one question, your Honor.

Redirect examination.

By Mr. Flynn:

Q. Mr. Long, you were advised yesterday about the question of the legislative hearings being brought into the case. You stated you were. By me, presumably.

A. Not particularly. You mean legislative hearings at the time this bill was enacted?

Q. No, yesterday, that the question of legislative hearings and testimony, Congressional hearings, had come into our present case here.

A. Yes. These documents you mean?

Q. Yes.

A. Yes. I misunderstood your question.

Q. And you were advised of that some months ago?

[fol. 624] A. Oh, yes, I have been. Well, naturally I went back to see what progress had been made in my own thinking.

Mr. Flynn: I have no further questions.

A. Because I hope we don't all stand still or static.

Mr. Flynn: I have no further questions.

(Witness excused.)

Fred Frizelle, a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Flynn:

Q. Will you state your name, please?

A. Fred Frizelle.

Q. And your occupation, Mr. Frizelle?

A. I'm employed by the Department of Public Instruction as inspector of private schools.

Q. And how long have you been in that position?

A. Since first of July, '46.

Q. And in the course of your work of inspecting private schools, have you accumulated any data concerning the teaching of foreign languages in both public and private schools in the Territory?

A. Yes, I have.

Q. Do you have that data with you?

A. Most of our reports are collected twice a year, and this one is of December, 1946; June reports would not be [fol. 625] ready yet. In the public schools foreign languages were taught in our four public high schools in Honolulu, McKinley, Farrington, Kaimuki and Roosevelt. Do you wish the names of the languages that were taught? (Referring to a document.)

Q. Yes.

Mr. Wirin: May I interrupt? If you have a document that you can introduce in evidence, it might save time?

Mr. Flynn: Do you have an extra copy of that?

The Witness: I do not. This is the only one I have, but I can easily have one made. Would that be all right?

Mr. Wirin: Yes, it might save time, if you were referring to some document, rather than take the time of the Court. Do you think that is practical?

Mr. Flynn: Yes.

A. (Continuing:) Then in addition to the foreign languages in public schools, I have a report on languages in the private schools, and there is no foreign language taught in any private school below high school level.

Q. Below the high school level?

A. No.

Q. In the course of your work, have you had application from persons or associations desiring to open a language school?

A. Yes, towards the end of 1946 I had one such application.

Q. Just briefly, who made the application?

[fol. 626] A. That was made by Mr. Won Chang, and he wished to open a Chinese language school in Kapena Lane, just off Nuuanu, near Beretania.

Q. Did you have occasion to refer to the statute concerning foreign language instruction?

Mr. Wirin: Objected to as hearsay.

Mr. Flynn: I asked if he referred to it.

Mr. Wirin: Well, any conversation he had with someone else is hearsay.

Mr. Flynn: He can testify what action he took in his official capacity, your Honor.

Judge Denman: What is the relevance of the action?

Mr. Flynn: Well, all I am going to establish is that the application was made, that the teacher or teachers were approved, and that to his knowledge the school has been placed in operation.

Judge Denman: Any question about it?

Mr. Wirin: No. It doesn't apply with us. We'll stipulate to that.

Mr. Flynn: You will stipulate to all that?

Mr. Wirin: Yes.

Mr. Flynn: And that the school is being operated on the Mun Lun School of the plaintiffs?

Mr. Wirin: Yes.

Mr. Flynn: I have no further questions of the witness.

[fol. 627] Judge Denman: Let me ask you this: I am a Japanese father, we will assume; I desire to have a Japanese language taught; in paying my taxes is there any point in, or rather I should say, prior to 16 years of age is there any point where the Territory would educate him in Japanese?

The Witness: I don't quite understand, Judge.

Judge Denman: Well, it may be an argument. But say that I am a father of Japanese origin, a tax payer, and I desire to have my children taught in the language and culture of my mind, now is there any place where tax money taken from me will give my child in Honolulu an education in the Japanese language?

The Witness: Yes, sir, on the high school level.

Judge Denman: On the high school level?

The Witness: Yes.

Judge Denman: What age would that be?

The Witness: That would be approximately fifteen.

Judge Denman: In other words, the only chance, then, that a child has to learn this language is one year before he is sixteen when a great percentage of them become self-supporting or employed, is that correct?

The Witness: That's correct.

Judge Denman: That's all.

Mr. Wirin: I have a further question.

[fol. 628] Cross-examination.

By Mr. Wirin:

Q. As a matter of fact, isn't it the practice in Hawaii for a large number of children about the age of 15 to go to work in canneries and elsewhere and to secure permission to do so?

A. That would be my opinion. A great percentage, and more in recent years, more so than in normal times.

Q. At the age of 15?

A. Yes.

Mr. Wirin: That's all.

Judge Metzger: In passing, what are the languages taught in the public schools?

The Witness: They have Korean and Filipino dialects and Japanese, Chinese, Latin, French and Spanish.

Judge Denman: That's in high school?

The Witness: Yes.

Judge Denman: Is any Latin taught prior to high school, to 15 year old people?

The Witness: Not on this island and not in the Territory as far as I know. The Catholic schools might be expected to teach Latin in the grades but they do not in this Territory in the grade schools.

Judge Denman: Are you sure that is true today?

The Witness: They do not teach it as a formal subject. They may introduce it incidentally in connection with [fol. 629] religion and with certain observances. But as far as I know they are not actually teaching Latin in the grades in the Catholic schools on this island today.

Judge Denman: How recently have you visited there?

The Witness: Within a few months, three or four months ago.

Judge McCormick: Do they teach word building in the primary grades at all in any of the schools in the Territory?

The Witness: Latin derivatives and Latin roots, and so on, not to my knowledge. I think that passed out shortly after our boyhood days. I did that but I don't think that is done the way it was in the old days.

Judge McCormick: That's an antiquated method?

The Witness: I think so.

Judge Denman: That's all.

Mr. Char: May I ask a question?

By Mr. Char:

Q. Did you examine the Catholic Church where Latin is being taught to youngsters that they can become altar boys? Have you made any investigation to that effect?

A. No.

Mr. Flynn: No further questions.

(Witness excused.)

Mr. Flynn: If the Court please, I have been subject to a slight mis~~judgment.~~ I had been fairly sure from counsel's [fol. 630] activity yesterday that my two witnesses would not be finished this morning. I am not prepared with the next one right now. It's probably half hour to the noon hour closing, and may I suggest to the Court a recess until Monday morning?

Judge Denman: Well, let's see, we've got to leave here and this case should be submitted by Wednesday afternoon. Is that going to be the case?

Mr. Wirin: I think according to the present schedule, which is my estimate. It's only an estimate but I think it's a reasonable one. We ought to be through with all testimony I think Monday.

Mr. Flynn: On Tuesday morning. I hope Monday will complete mine entirely, but maybe one witness will carry over.

Mr. Wirin: What I was hoping is that we might conclude all the testimony by Monday and have some argument Tuesday morning and submit it some time early Tuesday afternoon. We'll try to cooperate in keeping the time schedule to that extent. I know Judge McCormick has another case which he wants to work on, too.

Judge McCormick: It certainly would be desirable if possible to complete the case, as far as the litigants are concerned, on Tuesday.

Mr. Flynn: I might be through Monday afternoon, but I wouldn't want to say; that depends again largely on cross-
[fol. 631] examination.

Mr. Wirin: Well, I assure your Honor that I will conclude by Tuesday evening. I am hopeful I will be concluded before.

Judge Metzger: Including argument?

Mr. Wirin: Including argument, Tuesday evening, yes.

Judge Denman: We will recess until Monday morning at nine o'clock.

(The Court recessed at 11:25 o'clock, a. m.)

[fol. 632] Honolulu, T. H.,
June 30, 1947.

(The trial resumed at 9:07 o'clock, a. m.)

The Clerk: Civil No. 765, Mo Hock Ke Lok Po, et al., vs. Ingram N. Stainback, et al., for further trial.

Judge Denman: The Plaintiffs' case is finished?

Mr. Wirin: Yes.

Judge Denman: You have no further witnesses?

Mr. Wirin: We will have witnesses on rebuttal.

Judge Denman: But not on the direct case?

Mr. Wirin: I believe not.

Emanuel Kwon, a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Flynn:

Q. Will you state your name, please?

A. Emanuel Kwon, K-w-o-n.

Q. Will you speak up a little louder?

Judge Denman: Let me ask you before you proceed with the witness—we have received an answer to the amended complaint,—

Mr. Flynn: Yes, your Honor.

Judge Denman: —does this contain any more in the way of denials or affirmative defenses?

Mr. Flynn: Than our previous answer? Substantially the same. I think a few changes to correspond to the new
[fol. 633] complaint.

Mr. Wirin: May I make an observation in that matter? I think Mr. Flynn is correct. As a matter of fact, also this answer does not contain as many denials as the former answer, particularly to the matter of the nature of the Plaintiffs' language schools and the matter of the investments of the Plaintiffs' language schools and those phases of the case. So that this answer raises all of the affirmative defenses so far as the Constitutionality of the statute is concerned, but is designed, as I understand it, to eliminate some of the collateral issues which were in the case prior to your Honors' arrival from the mainland.

Judge Denman: Well, are there any statements of fact pertinent to the issues remaining that appear in the answer that was filed before that do not appear here?

Mr. Wirin: I think there is one substantially, one matter which may or may not be ultimately material. In this answer to the amended complaint the defendants allege that there are very few persons who want to send their children to language schools. And we think that helps us because it shows the extent of the evil as much less, than if a very large number of persons in the community sought to send their children to language schools. Other than that, I think there is no difference.

By Mr. Flynn:

Q. Your name is Mr. Emanuel Kwon?

[fol. 634] A. That's right.

Q. And your occupation, please?

A. School teacher.

Q. School teacher?

A. Vice principal in the school.

Q. Which school?

A. Central intermediate school.

Q. And you have been appointed to a principal's position for this coming year, have you not?

A. Yes, sir.

Q. What school?

A. It's Kipapa school.

Q. Here on this island?

A. Yes, sir.

Q. How long have you been with the Department of Public Instruction?

A. I have been with the Department of Public Instruction since 1935. Of course, during the war I was with the Army of the United States for five years.

Q. And prior to entering upon your profession of teaching you graduated from the Teachers' College at the University of Hawaii?

A. Yes, sir.

Q. What grades of school have you taught?

A. I have taught from the third grade up, all grades from the third grade up.

[fol. 635] Q. Through intermediate level?

A. Yes, sir. I have taught in high school also.

Q. In the high school also?

A. Yes, sir.

Q. Now, in the course of your work in the Department of Public Instruction, Mr. Kwon, have you had any occasion to notice whether the studying of foreign languages on the part of the pupils in the first four grades has in any way interfered with their progress in the public school work?

A. When I was a student in grammar school there were many cases where boys and girls would give as an alibi for not doing their home work the fact that they went to language school and had other work to do.

Q. And in your own teaching did you find in any way the pupils to have been suffering any interference in their regular school work by reason of attendance at language school?

A. Not in my teaching. I can't think of any cases that may be attributed directly to the language school. However, the English that was spoken in the schools I have noticed that most of the boys and girls that went to the language schools spoke a brand of English which was very much inferior to the other boys and girls.

Q. Now, have you ever had any occasion to study an Oriental language yourself, Mr. Kwon?

[fol. 636] A. Yes, sir.

Q. When was that?

A. In 1943, I believe, I went to a Chinese language school which was sponsored by the Army at the University of California. I had six months of that. I believe I learned sufficient Chinese to get along in China because I did not use any interpretor all the time that I was there.

Q. Is it your opinion, then, that the acquisition of the Chinese language can be accomplished after a person is beyond the early childhood years?

A. Yes, sir.

Mr. Char: I object to that. He is not an expert in that line, from his background. He said that he spent six months in the language.

Judge Denman: Do you contend that a man can't learn the Chinese language after 15 years of age?

Mr. Char: He can, but not in six months time. He can, but it took me more than 12 years to happen to learn the language properly.

Mr. Wirin: Maybe this witness is better.

Mr. Char: I'll grant that.

The Witness: May I say something?

Mr. Flynn: May the witness speak further?

Judge Denman: What is the question?

(The reporter read the last question and answer.)

[fol. 637] Judge Denman: Objection is overruled.

By Mr. Flynn:

Q. Did you answer that before, Mr. Kwon?

A. Yes, sir. What I said was that in that six months that I took Mandarin at the University of California at this Army school: I learned enough Chinese so that I could get along in China. I did not use an interpretor all the time that I was with the new Chinese Sixth Army there. I lived with the Chinese. I learned a lot. But we got along very easily.

Q. Did that extend only to the spoken language or to the written language as well?

A. I learned to write five hundred characters, which is very small, but with five hundred characters you can just about get along. It's very difficult.

Mr. Flynn: You may cross-examine.

Cross-examination.

By Mr. Wirin:

Q. Mr. Kwon, you know, do you not, that Mr. Long, formerly Superintendent of the Department of Public Instruction, and the present Superintendent, have been witnesses in this case in behalf of the Defendants, against the language schools?

A. I read about it in the papers the other day.

Q. And you receive your pay as a teacher from the Department of Public Instruction?

[fol. 638] A. Yes, sir.

Q. Now, in connection with your observation of children in the schools, have you observed whether or not Portuguese and Hawaiian children have had some difficulty in acquiring English, or rapidly, in the schools?

A. Well, I believe all our children in the Hawaiian Islands have a little difficulty there. I think the degree of the proficiency in the use of English, if you want to ask that question that way, I would say that the Portuguese and the Hawaiians probably speak a little better English than the others.

Q. A little better English than who?

A. Than the Oriental boys.

Q. Than haoles?

A. No, I say the Oriental boys and girls.

Q. But you take generally Portuguese and Hawaiians, they speak a little better English than the Chinese and Japanese?

A. I believe so.

Q. That is true generally of all Chinese children?

A. Generally of all.

Q. I mean the Hawaiians and Portuguese generally speak better English than Chinese children do generally?

A. I believe so.

Q. And do they speak, the Portuguese and Hawaiians [fol. 639] generally, better English than Japanese and Chinese children do?

A. I didn't quite understand that question.

Q. Do Hawaiian and Portuguese children generally speak better English than Chinese and Japanese?

A. In my observations in the schools, yes, sir.

Q. So far as the Chinese and Japanese children are concerned, do you think they speak good English or bad English, about the same, Chinese and Japanese?

A. Yes, sir.

Q. You know, don't you, or do y a know, that most of the Japanese children went to language school, that only a small proportion of the Chinese children went to language school, don't you?

A. No, sir, I don't know what proportion.

Q. You don't know that?

A. No, sir.

Q. Now, this course which you took, six months course, that was a very intensive course, wasn't it?

A. Yes, sir.

Q. And how many hours a day did you spend?

A. We spent, oh, an average of about five to six hours a day.

Q. And six days a week?

A. Five days a week.

[fol. 640] Q. Five days a week?

A. Yes, sir.

Q. Well, that course was intended specially to teach Chinese to adults in connection with possible war service, wasn't it?

A. Yes, sir.

Mr. Wirin: That's all.

Judge Denman: Between your actual hours in the class room when you were teaching, when you were learning, were you reading Chinese in the interim overnight or studying it overnight, home work?

The Witness: Yes, sir, we had lots of home work.

Mr. Wirin: So you had not only your five hours a day but you had home work besides?

The Witness: Yes, sir, we had lots of home work.

Mr. Char: May I ask a question, if your Honor please?

By Mr. Char:

Q. You are part Chinese?

A. No, sir, I am part Korean. I never studied Korean but I am part Korean.

Q. That is, you knew Chinese prior to this six months course that you had?

A. No, sir.

Q. And you didn't know Chinese characters at all or Korean characters?

[fol. 641] A. No, sir.

Judge McCormick: In your early life, prior to your matriculating in the University of California, you had had very frequent contact with Oriental people?

The Witness: Yes, sir, all my life I have lived with them.

Judge McCormick: I mean intimate contact.

The Witness: Yes, sir.

Judge McCormick: Not merely association but your association with people who spoke the Oriental language?

The Witness: That's right, yes, sir.

Judge McCormick: So that you wouldn't consider, would you, that your experience was of the normal average person of your age?

The Witness: I mean mine was.

Judge McCormick: Well, with the advantages that you had previous to going to the University for the purpose of studying Oriental languages, would that be in a class that is not normally true of the average college man of your years?

The Witness: Well, we had about 23 members in our class. Of those 23 only 3 boys were of Oriental ancestry and had any experience with the Oriental races. That meant that most of the boys in that class, about 20 of them, were mainland boys, boys who had no experience with the Oriental races, and I would say of that 20 about 12 of them could [fol 642] speak better Chinese than I could when the six months was over.

Judge McCormick: You mean better Chinese than you could in the restricted area of the knowledge of the language that was taught in those classes?

The Witness: Yes, sir.

Judge McCormick: That pertained exclusively to military or allied military matters?

The Witness: Well, they taught us enough Chinese so that we could get along in the community also. So the study of Chinese was not directed through military channels alone.

Judge McCormick: So that you could get along in communities insofar as it became necessary and advisable?

The Witness: Yes, sir.

Judge McCormick: In teaching the military angles?

The Witness: Yes, sir.

Judge Denman: Well, now, these difficulties, pronunciation of the "th" and the use of the tongue against the teeth, how long did it take you to master that?

The Witness: I believe, well, my father is Korean and he did not let us study Korean at all; we did have language class in Korean but he would not let us take that class because he believed that we should learn English first, master the English language. And I would venture to say this, I believe my family, that is, the children in my family, spoke [fol. 643] a better brand of English throughout the grammar schools for the simple reason that my father insisted on

it. He doesn't speak very good English. He speaks pidgin English. But he insisted that we learn English first.

Judge Denman: Well, as a baby you spoke Korean with your parents?

The Witness: No, sir. My father would not speak Korean to us at all.

Judge Denman: In other words, your family language was pidgin?

The Witness: That's right, yes, sir.

Judge Denman: Well, now, how about these 12 Europeans in this class of yours?

The Witness: We had 20 Europeans.

Judge Denman: Twenty Europeans?

The Witness: Yes, sir.

Judge Denman: How about their difficulty in mastering the peculiarities of Chinese speech insofar as it involves the use of the tongue, and so on, did these men have any difficulty with that?

Witness: The first two or three weeks they had a little difficulty, yes, sir.

Judge Denman: So within two or three weeks they were able to master it?

The Witness: Yes, sir, that's right.

[fol. 644] Mr. Wirin: No further questions.

Mr. Flynn: No further questions, your Honor. Thank you.

(Witness excused.)

Mr. Flynn: Dr. Jacobson.

Direct examination.

By Mr. Flynn:

Q. Will you state your name, please?

A. Dr. J. Robert Jacobson.

Q. And your present occupation, Dr. Jacobson?

A. I am clinical director at the Territorial Hospital.

Judge McCormick: Will you raise your voice, please?

A. I am clinical director at the Territorial Hospital at Kaneohe.

Q. You are a physician?

A. Yes.

Q. Just briefly, Doctor, what is your educational background?

A. Well, I'm a doctor of medicine and I have specialized in psychiatry for the, — since 1930, and have been practicing as a specialist in psychiatry. I passed the national board in psychiatry. I was chief of neuro-psychiatry at the Aiea Hospital before I left the Service.

Q. And what was your medical school?

A. University of Illinois.

Q. And your present duties as clinical director of the [fol. 645] Territorial Hospital includes some work with children in the public schools?

A. No, it does not. That was a separate project that was started when I was in the Naval Service. And it began with, in collaboration with Miss Pratt, who was a supervisor in the schools. Miss Pratt was a supervisor in the schools and I had certain ideas about psychiatric techniques that might be applied in the schools, and I had the time at the moment and she was interested, and the Department of Public Instruction permitted me to do some, and so we began in a small way to investigate the possibility of applying these techniques in the schools. And that work gradually grew over a period of four years until we had examined, worked with quite a number of children, hundreds of children.

Judge Denman: What years was that?

The Witness: We worked, well, primarily we worked with the primary grades, from the first to the sixth.

Judge Denman: No, what calendar years?

The Witness: Calendar years? From 1943 to 1947.

Q. Will you outline briefly for us, Dr. Jacobson, what nature of work you were doing with Miss Pratt for the schools?

A. Yes. One thing I worked a lot with groups, psychotherapy among mentally ill and a good deal with the mentally ill, and working out group techniques. You're not interested in subject matter, you're interested in a sick [fol. 646] person; you're interested in a group as a socializing influence; you're interested in a person because he is emotionally disturbed; and you're interested in all of the types of approach to that person that influences him toward a reintegration or resocialization or the return of normal objectives as opposed, let us say, to the delusional ideas and hallucination and crying and injudicious loss of temper, that sort of thing. Now, in the schools we inaugurated

much the same thing but, of course, we had to modify the techniques. We made it very much like an ordinary classroom. Anybody coming in would have thought that we were conducting a course in reading. Yet we weren't interested in reading; we were interested in the quality of attention, concentration of the child, the degree of emotional disturbance, his ability to reflect. And we did find that most of the disturbances, let us say in reading, were not due to a speech reading disability, were not because a child couldn't read. We proved that time after time. But they were because of an attitude on the part of the child, an attitude that he couldn't, an attitude that he wouldn't—emotional instability with confusional tendency. And when we supported him emotionally, we found that any number of these children who apparently couldn't, could. That's the way we worked. That was the group technique.

Mr. Wirin: May I interrupt, please? We move to strike [fol. 647] the witness' answer for the reason that obviously it is immaterial and incompetent in this case. The study was made in 1943. The language schools had already been closed for two years. And any study made at that time obviously could not be material or bear upon the problems before this Court in this case.

Judge Denman: I imagine what this may lead to is that the children having a marked Oriental background are subject to higher chances of neuroses than children that haven't. Is that the purpose?

Mr. Flynn: That is the purpose, your Honor. It is also background data for some further testimony that will come up concerning the existing disturbances or conflicts being suffered by the children, and opinions as to the effect of additional foreign language study upon them.

Mr. Wirin: Well, I would have no objection if the question would be pointed up a little so that we could see how material it would be.

Judge Denman: Well, we'll see. The objection is overruled.

Q. Dr. Jacobson, has your work been confined to any particular grades in the primary schools?

A. Well, first we worked with all the grades and then gradually we felt, since we could pick up these disturbances in the first grades just as readily as we could in the sixth [fol. 648] grade, since we could see in the first grade what

we saw as an end result in the sixth, the same type of thing except that in the first grade the child was more amenable to suggestion to treatment, to handling, the therapy was much more effective, we gradually confined all of our work to the first, second and secondly to the third grades.

Q. Now, in your work, have you found or can you make any estimate as to the number of children per age, of children who have required some treatment from your department?

A. Yes. It seems to me very alarmingly large; that is, in some schools smaller and in other schools larger. And it would range from about 20 percent in some schools to about 40 percent in other schools, with an average of around 25 to 30 percent in the children that we were in contact with. This was confirmed by a statement made by Dr. Loper, so I think there is a general—it agrees with our experiences.

Q. Now, in your work have you found language difficulty to be any cause of the disturbances that you mentioned?

A. Well, I don't know that I'd call it a cause. I'd say that language disturbances was the outstanding evidence of the general emotional disturbance of the child. That is as we saw it, the emotional disturbance was primarily the cause of the inability to adjust adequately in the language situation. Their phonetics was bad, their grammatical construction was bad, they had difficulty in phrasing their [fol. 649] thoughts in the language in oral composition, they had difficulty in acquiring adequate reading skills. And the language disturbance was the thing that we explored as the chief evidence of the emotional disturbance. That was the outstanding abnormality.

Q. Now, Doctor, have you had any occasion in your work to estimate the percentage of Oriental children as against members of other racial groups?

A. I don't have the exact figures, but, of course, my impression is that a greater number of them were Oriental extraction. That's just a statement of fact.

Q. To some extent?

A. But I don't have the figures; no we did not very carefully compare Japanese, Chinese, Korean, Portuguese, Hawaiians, we did not do that. So all I am giving is a general impression.

Q. Now, on the basis of your work, Dr. Jacobson, do you have an opinion as to whether such children, if they were to take on a formal study of a foreign language, specifically

an Oriental language, would be further handicapped or have their progress interfered with?

Mr. Wirin: We object to that on the ground that the question is not clear as to what is meant by such children.

Judge Denman: The objection will be sustained.

Q. The children you have been working with, Dr. Jacobson?

[fol. 650] Mr. Wirin: That is objected to as too general and vague. It is not clear.

Judge Denman: This gentleman said that these are all classes of children, except apparently white children, is that correct?

The Witness: No, there were some white children, too. What I did say was that I couldn't give an accurate delineation in terms of percentage as one against the other. I could only give a general impression that the Orientals were predominant.

Judge Denman: They were predominant anyway?

The Witness: That's right. And therefore I couldn't give the type.

Judge Denman: You couldn't say as to any difference of one from the other?

The Witness: Without a very accurate study of that type. We didn't make such a study.

Mr. Flynn: I'll refer the same question again to the matter of the children that Dr. Jacobson has been concerned with and ask the question first as to any of the children.

Mr. Wirin: We object to that as being too general.

Judge Denman: What is the question? What about any of the children?

Judge McCormick: You'd better rephrase it.

[fol. 651] By Mr. Flynn:

Q. I'd like to ask you, Dr. Jacobson, do you have an opinion as to whether the study of a foreign language by children in the first three grades of primary schools would interfere with their work in the primary public schools and in their general mental welfare?

Mr. Wirin: Well, now, that's objected to as compound and two parts conflicting really and have no necessary relationship. Moreover, this witness does not claim to be

an expert in education. He happens to be an expert in psychiatry. I am going to object to the question.

Judge Denman: I think it is duplicitous.

Mr. Flynn: Beg your pardon?

Judge Denman: It is duplicitous. You have two objectives there in your search for information.

Mr. Flynn: I'll confine the question first, then, to the mental health of the children.

Mr. Wirin: I wonder if that couldn't be rephrased so that we could have a specific clear question?

Mr. Flynn: I'll try once again.

Q. Dr. Jacobson, do you have an opinion as to whether the study of a foreign language by children in the first three grades of elementary schools is likely to have any effect upon the mental welfare of such children?

Mr. Wirin: Objected to as still pretty general.

[fol. 652] Judge Denman: I will allow the question.

The Witness: May I answer this?

Judge Denman: Yes.

A. Well, may I divide it? May I divide the children into two groups? One would be the group which was obviously having difficulty, so much difficulty that from my standpoint they were really seriously mentally ill. They were emotionally disturbed. One child, for example, was standing at a doorway, wouldn't move her hand to take hold of chalk, wouldn't go to the washroom, would be untidy right where she was, would not speak. Really, she was really an insane little child. But nobody calls them insane, you see. This is one type of child who is obviously mentally sick, yet because they are so young no one characterizes them as such. Now, obviously a child like that cannot take up an extra burden when she can't possibly handle the burden she already has. Of course, that is one extreme. Then we have all gradations in this group, that is, having so much difficulty to the individual. For example, one who has an antagonistic attitude, not obvious but as we interpret it the stupidity that child shows, the inability to learn, the inability to adjust in the school as an expression of an instance of hostility to the situation, the learning situation. Now, I can't see how a child like that could possibly take up an additional burden. And we have all gradations in [fol. 653] this, inability, unwillingness, emotional disturb-

ance, confusional tendencies. And I can't see how they could take up the additional burden, because it took everything we had, working very consistently with them—for example, this one child we had to work with her for a year and one-half before we finally had her behaving in a fairly normal state. And I still wouldn't want to add an additional burden of learning an Oriental language.

Judge Denman: Doctor, do you know of any parents of any one of these children that you have described as having these aberrations from a normal child psychology that wanted to put that child in a foreign language school?

The Witness: I am not qualified to discuss practically.

Judge Denman: Do you know of any parent of any of these children that you described as aside from the normal, do you know of any parent that puts such children in a language school?

The Witness: I do not.

Mr. Flynn: You may cross-examine.

Cross-examination.

By Mr. Wirin:

Q. Now, these studies that you have made have never been incorporated in any publication, have they?

A. Yes, they have.

Q. What publication?

A. Well, we did publish one article in the Psychiatric [fol. 654] Quarterly. I believe it was in 1943, shortly after we had started on group psychotherapy in the elementary schools.

Q. What was the name of this study?

A. "Group Psychotherapy in the Elementary School."

Q. Does that study bear out the opinion which you have been expressing concerning the possible effect of attendance of language schools upon the emotional make-up of a child?

A. I never said anything about a language, the influence of language schools. I merely gave my opinion that these children who were so sick, who are having so much trouble, I certainly wouldn't want to burden them with this additional chore. That's all I said.

Judge Denman: Well, it wouldn't make any difference, then, whether there was an additional language school?

The Witness: Or anything else.

Judge Denman: Suppose the father wanted to make them into a mathematician?

The Witness: That's right, certainly. I did not specify.

Q. Now, those children whom you talked about, specifically the example of the mentally ill, a child whom you said—the child that you said was insane but no one knew it—of course, that child was insane for reasons other than any language problem, wasn't it?

A. The child was basically sick and therefore could not [fol. 655] adjust to the language situation. That's right.

Q. The language situation didn't cause the child's insanity, did it?

A. The language situation was the evidence of the child's inability to get along, that's right.

Q. Now, in other words, therefore, the language deficiency in some instances may be evidence of serious mental health?

A. It certainly may.

Q. But you wouldn't say that any language deficiency is the cause of serious mental ill health, would you?

A. Language deficiency is the cause? No, it is a symptom. It is a symptom.

Q. In other words, it is a symptom of what is already there?

A. That's right.

Q. It tends to demonstrate that a child is inferior mentally?

A. Inferior?

Q. I mean defective mentally.

A. Defective? That's a sort of a moot point. It is a kind of a ticklish situation because we are trying to prove that they are not defective, that they are emotionally sick. There's a difference. The psychologists have emphasized mental deficiency as a breakdown. The child is labelled as [fol. 656] stupid and you don't do anything more for them. We say they are sick, and aim at curing them. There is quite a difference.

Judge Denman: Doctor, isn't it true that you have a norm, which is about like the average in a group of mathematical figures, that norm which is what a human being ought to be in adjustment to life, that all of us either are above it or below it, isn't that it?

The Witness: Yes.

Judge Denman: Isn't that in the world of psychology?

The Witness: That is obviously true.

Judge Denman: And there is the attempt to bring those who are beneath this norm to it, or above it if they can?

The Witness: That's right. That's exactly what we are trying to do. That's right.

Judge Metzger: Do you or do you not attribute in large part this distress of certain of these children to the fact that they were in strange surroundings and in dealing with the language in which they were not very familiar, and the apparent superiority of the people who were in charge of the school?

The Witness: Yes. I think there was considerable evidence of that, that is, that these children did have a specific language problem because of a lack of adequate background in English, because of a difficulty in acquiring English, [fol. 657] phonetic skills, grammatical construction, learning to think in terms of language. Their basic way of thinking was in terms, I assume, in terms of an Oriental language rather than English, and the problem of making the transition did add to their difficulties. I was certainly impressed with that.

By Mr. Wirin:

Q. And did that apply generally to children of Oriental parentage?

A. It applied to a certain percentage of those children of Oriental parentage.

Q. Now, the percentage of children of Oriental languages to which you have reference, does that apply to Korean children?

A. It certainly did.

Q. Do you know whether or not Korean children attended language schools in a very small amount? You do not know that?

A. I wasn't interested in that side of it. I was interested in the children as they were, in the background and the rest of it. That was one of the criticisms levelled at us, that we didn't have sufficient knowledge of the background. But of course, we were limited by being only a few people trying to cover a lot of ground, and so we dealt with the situation as we found it.

[fol. 658] Q. So you did not inquire at all into the background of the children?

A. We would inquire into a background incidentally but we didn't make that a primary aim.

Q. But such background as you inquired into did not include the matter of attendance in a language school?

A. No.

Q. You were not concerned with that phase at all?

A. Not at all.

Q. Now, this difficulty in phonetics and grammatical construction which applied to the group that you have been talking about, did it apply also to Portuguese, Filipino children?

A. It most certainly did.

Q. Well, of course, Portuguese are not Oriental?

A. No. In other words, it applied to pidgin.

Q. It applied to whatever child came from, if he came from a family where English was not the major tongue?

A. Yes, definitely.

Q. Irrespective of the race?

A. Yes.

Q. Or the language which was involved?

A. That's right.

Q. And would you say it applied equally to Portuguese as it did to Chinese substantially?

[fol. 659] A. Yes, I think so.

Q. And again, you do not know whether or not Portuguese children attend language schools in the Islands? You are not concerned with that?

A. Absolutely not.

Q. Now, with respect to the matter of emotional conflict, am I correct in stating that one of the best places to avoid emotional conflict is in the home of the child?

A. I would say a very definite yes. We started as early as we could, which was in the first grade. If we started earlier than that, that would be fine.

Q. And if the psychiatrists or the psychologists can see to it that emotional conflict is eliminated in the home, it would result in greater mental health for the child?

A. It certainly would.

Q. Let's assume a situation where the parent is of foreign descent and cannot speak English But speaks only Chinese. Would it or would it not be conducive to the mental health of the child if the child is the more able, is able the more

readily to communicate with the parent in the language of the parent?

Mr. Flynn: If the Court please, I want to make an objection to that question. There have been questions of similar type before, but there has been nothing in the Plaintiffs' evidence concerned with situations in families where [fol. 660] parents spoke no English.

Judge Denman: Well, we had witnesses describe that situation, speaking either on direct or cross-examination; we have had testimony here to that effect, that it is highly advantageous to have the home discipline and the home communion, parent to child, expression of the language between the two parties.

Mr. Flynn: Well, I don't think that is any part of the Plaintiffs' case, your Honor. Some general observations or questions did come out, I think, primarily, in fact only in cross-examination of my witnesses.

Judge Denman: I think it has been directed to this: Here is a statute which they are claiming is un-Constitutional because it deprives the parent of a right in the relationship of his child, and the answer has been, well, that the general community betterment warrants an education of the child completely in the English language, or during certain years, despite the desire of his parents. And the question has come up as to whether or not or as to the degree on each side between the absolute control of the parent and the absolute control of the state. Now, in this case, as I take it, there is a borderline between those two. Now, in the course of that we have had testimony right along but none from the psychologist as to how much relationship, a parent-child relationship, has diminished where there is a disturb- [fol. 661] ance on the difference of language between the two parties. I take it that this question is directed to inquire as to whether these children showing a psychosis or showing a disturbance, how far that could be effected or caused by disturbance in language between the parent and child. Now, that, it seems to me, would be a direction as I see it. I can't speak for my two associates.

Judge McCormick: Dr. Jacobson, are you considering the question of psychosis?

The Witness: No, I merely gave that as an extreme. The vast majority of these would not by any stretch of the imagination be termed psychotic. They are emotionally disturbed children.

Judge McCormick: But normal?

The Witness: I merely pointed out one extreme who definitely had gone so far that she was really——

Mr. Wirin: My question is limited to emotional disturbance.

Mr. Flynn: Well, if I may be heard for a moment, if the Court please—the question assumes a situation, namely, that there is a foreign speaking parent, non-English speaking parent, which is not in the Plaintiffs' case at all. There is no challenging of our law concerning that situation. The only party Plaintiffs have shown clearly that they can speak English perfectly well, as well as anybody else. And this [fol. 662] is a theoretical discussion.

Judge Denman: Do I understand the Constitutionality of this Act rests upon the relationship of Plaintiff and Defendant?

Mr. Flynn: No, your Honor. But in this particular question there is an assumption of circumstances which I might say is immaterial.

Judge Denman: In that event none of your evidence concerns parents who speak English and children who speak English, because you haven't differentiated at all in your testimony; you have gone over the whole area of children selected for psychopathic investigation without distinguishing between the two. Now, on your suggestion that would be relevant evidence. If the only issue here were between English speaking parents and English speaking children of Chinese extraction, this wouldn't be relevant. But it is obvious what you are trying here is the Constitutionality of the Act in toto as it applies to everyone.

Mr. Flynn: Yes, we agree on that, your Honor. But the theoretical situation——

Judge Denman: The question is proper. We will overrule the objection.

The Witness: Would you repeat that?

(The reporter read the last question.)

A. Of course it would.

[fol. 663] Q. It would?

A. Certainly.

Q. That would be particularly true, would it not, where in addition to inability to speak English well on the part of the parent, the parent also came from a different culture and acquired a different culture in a foreign language, and

where the parent is trying to adjust itself to the child's culture and the child also trying to adjust itself to the parent's culture, wouldn't that be so? In other words, there would be greater emotional health for the child if the child is able to communicate to the parent efficiently in the language of the parent?

A. I wonder if I could answer it this way——

Q. You answer it any way you like.

A. All right. That I would think that the best solution would be not for the child to develop a knowledge of Korean but for the parent to develop a knowledge of English.

Q. Of course, it might be difficult for the parent who has grown up in another country and has acquired certain language to master the English language as efficiently as if the parent came from the mainland?

A. That's right.

Judge Denman: Studying and supporting the family?

The Witness: The same thing holds, that these particular children that I am talking about would have even more [fol. 664] difficulty acquiring the other type of language, culture; I mean, in other words, acquiring an additional burden would be greater on this child who is having a tough time than it would be on the presumably normal parents who merely have to acquire English and don't have the emotional problem that this child has.

Q. Now, the group of children which you have been talking about is the marginal group, a group of children already subnormal or abnormal because of emotional instability due to many factors?

A. Marginal? There are 25 to 30 percent. But I hate to call that many—I don't know what you mean by marginal anyway. I'm not sure that I know what you mean by marginal. Would you explain a little more what you mean?

Q. Well, I don't want to go into——

A. Well, I mean if the term is ambiguous then I don't know that I am answering the question.

Q. Well, I think generally—just one final question. You have stated already that it is your opinion as a psychologist and psychiatrist that generally it would lead to the emotional health of the child, the average child in a family where the parents cannot speak English well for the child to be able to speak well in the language of the parents?

A. I think I have restated it by saying for there to be an adequate language communication between parent and [fol. 665] child; yes, that's right.

Mr. Wirin: All right. That's all.

Judge Metzger: As I take it, most of these very deficient children showed an instability, a mental instability, before they came to the school.

The Witness: I would say yes. They brought with them already a type of maladaptation which increased in terms of the additional problem of school adjustment. Yes, that's right.

Judge McCormick: May I ask a question?

Mr. Wirin: Yes.

Judge McCormick: I understood you to testify earlier that you got the best results, the best corrective results, with those children in the lower classes?

The Witness: Yes. You can see why.

Judge McCormick: Why?

The Witness: These children would be in a school year after year learning nothing, just sitting there. The teacher assumes that they are too dumb to learn. The child acquires a habit of not learning. No one holds them up to a responsibility. If you live that kind of a life for one, two or three years, it is going to be hard to change into one of industry and perseverance and shouldering responsibility. It becomes a habit that is easy to get. We forget it because we become so accustomed to shouldering responsibility. If [fol. 666] we adopted it for about two or three years, it would be kind of difficult to get back again. It's like a limb that you don't use. You can be as paralyzed from disuse as you can from an actual stroke.

Judge McCormick: That's the most impressive period of a child's school life?

The Witness: And these children are still malleable. All the components that make for illness are there. They are having the trouble getting along. No one assumes that they are sick because they say they will grow out of it, or, after all, it's only a baby. So that next year there is the same thing. Then the third year everyone gets alarmed because they are obviously too old to be learning so little, and by that time you have three years in which they have done nothing. So we'd rather pick it up in the first year, assume that it is a corrective thing, and not leave it to chance so that they will grow out of it.

Judge McCormick: The corrective act of therapy would be best employed during those early years?

The Witness: I would think so. Or as the attorney—I don't know his name—said, that even earlier, if it could be applied by the parents.

By Mr. Wirin:

Q. In other words, it is the period from the first to the fourth grade during which the child is most impression-
[fol. 667] able generally?

A. Is most susceptible, yes, that's right, either to bad or good influences, that's right.

Q. And to acquiring good or bad habits?

A. That's right.

Q. To acquiring knowledge of the language?

A. That's right.

Q. Now, one other matter. The children in the group you talked about, either as a result of your help or nature they gradually work out their situations somewhat, don't they, and they get through school and become normal citizens doing the ordinary tasks of ordinary people, don't they?

A. Amazingly there must be some such tendency because if they didn't there would be so many people in Kaneohe and so many in these schools that everybody becomes and is concerned about the problem as we are. That's right.

Q. And they become good citizens generally, don't they?

A. That I can't say. I don't know how good they become. I don't know to what extent they grow out of it. I am merely sure that there must be some natural processes in the individual that lead to the gradual change in attitude on the part of the child, but I don't know what they are. Nobody is following them. It is a non-systematic thing. And a certain number certainly fall by the wayside. How many, I can't say.

[fol. 668] Q. The whole field is pretty much exploratory, if not uncertain and speculative still?

A. No, I'd say there is a lot I don't know about it; there is a lot we do. But there is a lot I don't.

Judge Denman: The same thing exists in maladjusted families, where the father and mother are fighting and the child comes into a disturbed world?

The Witness: I might say that we have definite evidence that we do have that type of a background very common here. That is very definitely true.

Mr. Wirin: That's all.

Mr. Flynn: No further questions.

(Witness excused.)

Mr. Flynn: Miss Yang, please.

SARAH LEE YANG, a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Flynn:

Q. Will you state your name, please?

A. My name is Sarah Lee Yang, Y-a-n-g.

Q. And your occupation, please, Mrs. Yang?

A. I am at present supervisor of the fourth, fifth and sixth grades at the Teachers' College Elementary School, University of Hawaii.

Q. And how long have you been engaged in your work [fol. 669] with the Teachers' College?

A. Just this past year I was actually there present at the Teachers' College. But previous to that I was out in a public school doing supervision of intern teachers. It was a double connection between the University and the Department of Public Instruction.

Q. And just briefly what is your own educational background?

A. Oh, I attended Island schools here right through from the first through the normal school that was back in 1929 when we had the two-year normal training program. Then I taught for one year after 1929. Then I was offered a scholarship to the Colorado State Teachers' College in Greeley, Colorado, and I went there. And I believe it was in '30—let's see—1929 and '30 I taught—and '30 and '31 I was over there finishing up my college education, got my degree in education, came back here, taught for about three years, and then I was offered this supervision work. In the mean time I had been attending the University of Hawaii here doing graduate work.

Q. Graduate work in education?

A. Yes.

Q. Now, when was it, then, Mrs. Yang, that you started your work with the Teachers' College on the intern supervising?

A. Oh, that was about '34.

[fol. 670] Q. And you continued with that?

A. Yes, I did that for about eight years. Then I stopped teaching. I took leave for about four years during the war.

Q. And then you resumed your work in 1945?

A. Yes, about '44.

Q. Did your teach continually until the outbreak of the war or stop before that?

A. Yes, I did right up through to 1941, up to June of 1941.

Q. Now, Mrs. Yang, on the basis of your work in the profession of teaching here in the Territory, do you have any opinion as to whether the study of a foreign language by children in the early grades in school interferes with their work in their regular schooling?

A. Well, I had a chance there to leave my profession for four years and so when I went back in 1944 I noticed quite a change there, and in 1944 after four years of not doing any actual teaching I found that the English spoken by the school children seemed to be on a higher standard. You see, I worked both with the younger children, actually teaching them, and then again with the college students who were doing their preparation for teaching. And in both the younger children and the older college students there was a distinct improvement in their spoken English.

[fol. 671] Q. Referring to the other question specifically then——

Judge Denman: Pardon me, may I ask a question?

Mr. Flynn: Yes.

Judge Denman: Wasn't there a strong movement throughout all your society here for the speaking of better English beginning in about '42 or '43, public movement in the press?

The Witness: It's been that way all along as far as I can remember.

Judge Denman: During the war wasn't there a special movement in which everybody joined, really a martial stimulus to the thing, so that when you came back into it there had been in the intervening period this pressure on the community to speak better English?

The Witness: Yes.

Q. Do you have any opinion, Mrs. Yang, as to whether the discontinuance of language school study had any effect on the improvement you observed?

A. Well, I believe that was one factor definitely.

Q. Now, referring again to the specific question I asked before, from your work in the schools do you have an opinion as to whether the study of a foreign language by children in the first four grades interferes with their regular school progress?

A. In my opinion it does.

Mr. Flynn: You may cross-examine.

[fol. 672] Cross-examination.

By Mr. Wirin:

Q. I think you said that in 1944 you noticed there was quite a change and an improvement in the ability of the children to speak English?

Q. Did you notice that improvement among the Korean children, Filipino children?

A. Yes, I had work to do with all the various racial backgrounds.

Q. Did you notice the improvement among Korean children?

A. Yes.

Q. Among Portuguese children?

A. Yes.

Q. Among Filipino children?

A. Yes. I worked with them.

Q. Among haole children, too?

A. I believe so.

Q. In other words, a general improvement, isn't that right?

A. Yes.

Q. You know, don't you, that the Portuguese children do not go to any language school, don't you?

A. I don't know whether they did or not.

Q. You say you didn't know that? Do you know whether or not the Portuguese children before 1941, when the lang-
[fol. 673]- uage schools were closed, did or did not attend any language school?

A. I don't know.

Q. You don't know?

A. No.

Q. Do you know whether or not Hawaiian children attended any language schools?

A. I don't know. Some of them may have gone.

Q. Well, don't you know that the language schools primarily included Japanese children?

A. Well, it depends upon the parents who wish to send them to the schools. There may be some parents of other national groups who wish them to learn——

Q. Well, during your observation you didn't discover certain racial groups like the Japanese send their children to language schools in much larger proportion than the Koreans, did you?

A. Well, I think they did because there were less Korean language schools.

Q. And did the Japanese parents send their children in much greater proportion than the Chinese? Did you know that?

A. I don't know. I don't have the figures.

Q. Well, upon what figures or information do you base your opinion that the language schools were responsible for retarding English if you do not know which children [fol. 674] did go and which didn't?

A. I simply go by the one factor that the language schools did stop, all of the language schools did stop at the outbreak of the war, and so these children did not have the opportunity to attend the language schools during that interim that I was not actually teaching.

Mr. Wirin: I think that's all.

Mr. Flynn: No further questions. Thank you.

(Witness excused.)

Judge Denman: I believe we will take a recess for ten minutes.

(A short recess was taken at 10:20 a. m.)

After Recess

Helen Gay Pratt, a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Flynn:

Q. Will you state your name, please?

A. Helen Gay Pratt.

Q. And your occupation, Miss Pratt?

A. I am connected with the Department of Public Instruction. I am the Director of Child Study and Remedial Work with the Department.

Q. Can you speak up a little more loudly, please?

A. Oh, yes. The Director of Child Study and Remedial Work for the Department of Public Instruction.

[fol. 675] Q. And how long have you been connected with the Department of Public Instruction?

A. Since 1912.

Q. And just a brief outline—what have been your positions with the Department?

A. I came here to teach in the Territorial Normal School and I was there until 1927. In 1927 I went to the main office as assistant director of research. And since 1934 I have been in charge of curriculum publication and supervisor in connection with that, until 1943. In 1943 I began work in the schools in connection with Dr. Jacobson.

Q. This work on child study and remedial work?

A. Yes, right.

Mr. Wirin: May I interrupt a moment? I am perfectly willing to stipulate that the testimony of this witness who worked under Dr. Jacobson would be substantially the same as Dr. Jacobson and subject to the same cross-examination, to save time.

Mr. Flynn: I appreciate that, your Honor, but I think there are a few observations that date farther back than Dr. Jacobson and more fully connected with that case.

Mr. Wirin: Well, so far as the testimony during the period covered by Dr. Jacobson, could we stipulate to that to save time, and supplement any further testimony that she will have, and we will cross-examine her as to that?

Mr. Flynn: I think we might ultimately save time to [fol. 676] let the witness make a couple of statements in answer to questions and let the cross-examination proceed.

Q. On the basis of your work in the last four years, Miss Pratt, do you have any opinion as to whether there is any generalized deficiency among students in the first four grades?

Mr. Wirin: Objected to as having been agreed to and therefore immaterial at this time.

By Mr. Flynn:

Q. Just briefly, what is your opinion concerning that deficiency?

A. We worked with all the children in the first grades of the schools with which we had been working, and more with the second. We include all the first grade children, not just the difficult problems. And we find that this type of thing described by Dr. Jacobson is prevalent to a degree in every child.

Q. Any of it attributable to language handicaps or difficulties?

A. We must remember that our children here have a foreign language already when they come to school. It is pidgin. That is a language by itself, which is not English.

Q. With that in mind, Miss Pratt, do you have any opinion as to whether the added study, formal study, of a foreign language would have any disadvantageous or harmful results on the children?

[fol. 677] Mr. Wirin: Now, may I inquire whether the witness is looking at some notes and what they are, so that we'd know? (Witness shows a purse) I'm sorry. Pardon me. Sorry. Pardon me, you may look at whatever you want.

The Witness: I was just fooling with my purse.

Mr. Wirin: All right.

A. (Continuing:) I have been working with all the children enrolled in the first grades in specific schools, and I work with them myself in the classroom every day. I have yet to find a child that I think could take the burden of an additional language at that age.

Q. And this is referring to all the children?

A. Yes, all. I have yet to see one that I think could take the strain of additional language at that age.

Mr. Flynn: You may cross-examine.

Cross-examination.

By Mr. Wirin:

Q. Do you mean that out of all the children that you have observed, even with respect to those who are extremely, unusually bright and intelligent, that you haven't been able to find one among all the children that you observed who could study English as well as Portuguese or French?

A. I say an additional language. They are already learning English. That's what they come to school, for one thing.

Q. You think that even the most exceptional and most [fol. 678] brilliant child in the Islands, that the study of a foreign language like French would be too severe an additional burden for the child?

A. Well, I haven't seen any that I'd like to put it on like that.

Q. Pardon?

A. I have not seen any children that I would care to put that burden on them.

Mr. Wirin: That's all.

Mr. Flynn: If your Honor doesn't have any questions, that's all. Thank you, Miss Pratt.

(Witness excused.)

Orin W. Robinson, a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Flynn:

Q. Will you state your name, please?

A. Orin W. Robinson.

Q. And your occupation, Mr. Robinson?

A. I'm on leave at the present time from the Department of Public Instruction.

Q. And prior to your taking leave, what position did you hold with the Department?

A. I was Deputy Superintendent and Director of Curriculum. I will return to that work in the middle of this coming [fol. 679] month.

Q. You are resuming that work in the middle of this coming month?

A. Yes.

Q. And briefly what other positions have you held with the Department?

A. I have been teacher on other islands, principal, principal at Makawao and Iolani on this Island; supervising principal on Maui; supervising principal in rural Oahu; and now my present work in the Department office.

Q. And approximately how long in all have you been connected with the Department?

A. About 27 years.

Q. Mr. Robinson, in the course of your work with the Department, have you had any occasion to observe whether there is any generalized English language deficiency in our schools?

A. In my opinion there is such a deficiency.

Q. Do you have an opinion as to whether the study of a foreign language by the children in the first four grades has any effect upon that existing deficiency?

A. I feel that there is such an effect, that there is a heavy burden laid upon the children and that with the home situation which we find in many cases with a foreign language base, that there is a great retardation in the acquisition of English.

[fol. 680] Q. Have you any opinion as to whether that retardation in the acquisition of English interferes with the general progress of the children in the schools?

A. I would say definitely yes, because the school work, the public school work, is based entirely upon the use of English, and the child who is retarded or incapable in English is unable to carry on the work of the school, which is in English.

Q. Do you have any opinion, Mr. Robinson, as to whether such retardation would be substantially lessened if the teaching and study of foreign languages were to be postponed until such children had finished the first four grades of elementary school?

A. I would answer that question in the affirmative on the score that we would then have in the public schools three or perhaps four years in which no organized study other than that of English was being carried on, and we then could get a foundation of English control which would make it possible for the children then to branch out and carry heavier burdens.

Q. Now, Mr. Robinson, you testified before the Congressional Committee in the hearings on statehood in 1935, did you not?

A. Yes, sir. Or perhaps, I should correct that, in that a prepared statement was read into the testimony. I believe that at that time I did not myself appear before the [fol. 681] Congressional group.

Mr. Wirin: Are you going to impeach your own witness, Mr. Flynn?

Mr. Flynn: No, I am going to confirm what it is.

Mr. Wirin: Well, we are going to object to it if it is for the purpose of confirmation. It is improper on cross.

Mr. Flynn: I want to ask him if he changed his opinion.

Mr. Wirin: Oh.

By Mr. Flynn:

Q. Mr. Robinson, I'd like to read to you from Page 83 of the volume entitled "Statehood for Hawaii".

Mr. Wirin: Plaintiffs' Exhibit No. 1 For Identification?

Mr. Flynn: Plaintiffs' Exhibit No. 1 is the 1935.

Mr. Wirin: Yes.

Mr. Flynn: House Resolution 3034.

Mr. Wirin: That's correct.

Q. Your statement, which was read here, Paragraph A, just before Paragraph A: (Reading)

> "I will comment upon two aspects of language school work with special reference to the Japanese group. General effect upon school work. The Territorial public schools are organized for full time instruction and, of course, use only the English language. The language schools add one full hour of instruction and much more than one hour of time to the child's day. The effect upon the child's health and attitude due to [fol. 682] this overworking is highly questionable."

Is that in accord with your present opinion, if any?

A. I do not think I would change that in any regard.

Q. Would you amplify that in any way concerning the question of whether the language study itself has any interfering effect upon the school work of the child in the regular public schools.

Mr. Wirin: That has been asked and answered.

Mr. Flynn: I think that is substantially correct. You may cross-examine.

Cross-examination.

By Mr. Wirin:

Q. Now, in connection with your testimony before the Congressional Committee referred to, when you said the

following, "The effect upon the child's health and attitude due to this overworking is highly questionable," did you not mean that the effect upon the child's health and attitude due to this overworking is doubtful, questionable?

A. That was the word that I used there, and perhaps that might be amplified in stating that the question is adverse, was adverse in my mind.

Q. When you said, "questionable", you meant doubtful, didn't you, to be questioned?

A. That is correct.

[fol. 683] Q. That is to say, whether or not there is any harmful effect upon the health of the child resulting from the language schools, referring to Japanese children, was highly questionable, isn't that what you were saying?

A. Well, it's—the effect is to be questioned.

Q. Is to be doubted, in other words.

A. Yes. We should doubt the advisability of it.

Q. Well, now, you don't question the effect any more? It is now your testimony that there is a very substantial effect upon the child's attitude and health due to the language schools, is it?

A. I feel that that is true.

Q. Now, did you, after you said that the effect is highly questionable also say, "In nearly all Japanese language schools there is a marked trend toward the employment of American trained teachers. This means obviously a closer and more friendly contact between the public school teacher and the language school teacher. The language school teachers are in the main quite frank and open and willing to lay their methods and materials of instruction before us for discussion." Did you make that statement, and that was substantially correct at that time in 1935?

A. Yes.

Q. And it is substantially correct now so far as the attitude and activity of Japanese language school teachers [fol. 684] between 1935 and 1941?

A. Correct.

Q. That's correct, isn't it? Did you also say, "So far as I have observed, there is no anti-Americanism in the teachers of these schools," did you say that?

A. Yes.

Q. Did you go on further to explain, "There is quite an understandable desire on the part of parents that the children shall know the language of the home and something of

the cultural background and traditions of the home," you said that, didn't you? Do you still agree that there is such an understandable desire on the part of parents who teach their children the language which is spoken in their homes?

A. I would say yes.

Q. You don't see anything objectionable to that, do you, and you don't see anything objectionable on the part of such parents to try to maintain between themselves and their children something of the cultural background and traditions of the home, do you?

A. No.

Q. Your last answer was No?

A. No.

Mr. Wirin: That's all.

Redirect examination.

By Mr. Flynn:

Q. Mr. Robinson, calling your attention to one further [fol. 685] statement, one further part of that same statement which reads as follows: "The children who attend the language schools are quite frank in their expressions of distaste and boredom; just as the German language schools are disappearing from the mainland because of the second generation of parents, so the Japanese language schools will disappear within fifteen or twenty years". You made that statement?

A. I did.

Q. Do you have any opinion at the present time either in support of that or contrary to it?

A. Opinion only. It is still my belief that with the passage of time the language schools as we have known them will have disappeared.

Q. At that time you made an estimate of fifteen or twenty years?

A. Yes.

Q. Do you have any estimate now?

A. I don't know whether I would need to lengthen that a bit or not. It may be longer.

Mr. Flynn: I have no further questions.

Recross examination.

By Mr. Wirin:

Q. In other words, as the general community speaks more and more English, and in view of the fact that aliens, particularly of the Oriental race, are not admissible to the Islands, and have not been since 1924, the problem because [fol. 686] of time will generally take care of itself?

Judge McCormick: Just a moment. May I have that question again?

(The reporter read the last question.)

Mr. Wirin: I mean through the lapse of time. Do you have the question in mind?

The Witness: Yes.

Mr. Wirin: Will you answer it, please?

A. I believe that is the case.

Q. In other words, just as a similar problem had disappeared through the lapse of time in communities like New York City, where there was a large immigrant population, which immigrant population became less and less as time went on, isn't that true?

A. The first generation immigrants, yes. I would not venture to speak positively to your point. Perhaps it is not correct to say that in all of those areas the language schools have disappeared. All one can say is that they are disappearing.

Q. Well, in that respect the pattern on the Island is similar to the pattern in the communities on the mainland where the immigrant population at one time at least was very large?

A. That I think is true.

Mr. Wirin: That's all.

[fol. 687] Mr. Flynn: No further questions. That's all. Thank you.

(Witness excused.)

Mr. Flynn: Now, if the Court please, counsel has been good enough to stipulate with me concerning testimony that would be given by one additional witness, a Mr. William Wong, who has a degree of Bachelor of Science in education, has been with the Territorial Department of Public

Instruction since 1932, has been a principal of a school six years on the Island of Kauai, one year on the Island of Oahu, and who as a child attended language school, Chinese language school, for six or seven years, who would testify that he believes the teaching of the Chinese language in the first few grades interferes with the progress of the children in the regular public school work, and that their learning of the Chinese language can be better accomplished if it were to be taken up after completion of approximately the fourth grade of public school. Is that correct?

Mr. Wirin: We will so stipulate.

Mr. Flynn: Now, if your Honor please, that will complete our case except for Dr. Smith, who is scheduled to testify at 1:30. Counsel has agreed to try to proceed with some parts of his case so that we will hope to be adequately finished by this afternoon.

Judge Denman: That is, you will begin your rebuttal now?

Mr. Wirin: I am willing to do that unless your Honor would rather take an early adjournment. That is entirely [fol. 688] up to the Court.

Judge McCormick: Do you think we will be finished if we took an adjournment now? Do you think we will finish the testimony, including the rebuttal, today by 4:30?

Mr. Wirin: Yes, probably by four o'clock.

Judge Denman: That is, if we recess until half-past one.

Mr. Flynn: Half-past one.

Mr. Wirin: I have another matter. Are you through?

Mr. Flynn: Yes. I was going to mention just briefly that I understood counsel was going to put on some additional affirmative evidence rather than rebuttal concerning the matter involved in the schools.

Mr. Wirin: We shall see. I don't think there will be much of that. There is one other matter. We have caused to be prepared a trial memorandum, which is pretty late coming in now, but which purports, at least indicates as to the cases upon which the plaintiffs rely and which may and we hope will be of some help to the Court. And I'd like to file such a memorandum and leave copies with the Court and a copy for counsel.

Judge Denman: It may be filed.

Mr. Flynn: Now, if your Honors please, I wish to offer in evidence in behalf of the defendants, as Defendants'

Exhibit 1, "Community Survey of Education in Hawaii", published in 1941, to which counsel has no objection.

Mr. Wirin: That's right. Your Honor, we have some evidence to offer, too, and perhaps this is the time to do it, [fol. 689] with respect to which there is no objection.

Judge McCormick: The offer of Mr. Flynn is accepted, I believe.

Judge Denman: Yes, it is stipulated. There is no objection.

Mr. Wirin: No objection.

Judge Denman: It is accepted.

Judge McCormick: Have you concluded your offers?

The Clerk: That's Exhibit 1 for the defendants.

(The document referred to was received in evidence as Defendants' Exhibit No. 1.)

Mr. Wirin: I have a number of matters to offer. It may take a few minutes, I think, not very long; but I'd like to get them out of the way.

Judge Denman: Go ahead.

Judge Metzger: Yes.

Mr. Wirin: First we'd like to offer as Plaintiffs' Exhibit next in order Dr. Symonds, Professor Symonds' article referred to. There is no objection.

Mr. Flynn: No objection.

Mr. Wirin: These are photostatic copies.

Judge Denman. Are there photostatic copies for us?

Mr. Wirin: Yes.

Judge Denman: Will these have to be copied into the record by the court stenographer?

Mr. Wirin: Whichever your Honor prefers. We do have [fol. 690] two other photostatic copies.

Judge McCormick: We can stipulate to receive in the record in lieu of a stenographic copy of the printed document a photostatic copy.

Mr. Wirin: We would rather do that to save the expense of transcription. In other words, these documents are fairly voluminous, for instance, the hearings. I wouldn't want the reporter to be expected to copy that.

Judge Denman. Well, in that respect have enough for each one of the three judges, because we are in three different places and we can't pass documents around. Each man is studying the case at the same time after submission

and we will have to have either those things in the record or have copies that we can use.

Mr. Wirin: All right.

Judge Denman: Do you get the situation? I will probably be in San Francisco. My associate here will be in Los Angeles, and my other associate in Honolulu.

Mr. Wirin: May I make this suggestion for what it is worth? There are certain documents which are short in space and with respect to which we can supply triplicates. There are, however, other documents which are far too voluminous and with respect to which there are no additional copies available. Now, would this procedure be agreeable to the Court? I think it is agreeable to counsel, that we offer the entire document now, that we call to the Court's attention the particular portions of the documer upon [fol. 691] which each side relied, for instance, the hearings.

Judge Denman: But have those put in the record, the portions which you rely upon, because if you are calling attention to a book which is in Los Angeles and I am in San Francisco, it does me no good. The same way with our associate from Hawaii.

Mr. Flynn: I might suggest further, your Honor, that if we do recess now possibly counsel and I could iron out several of these matters and have them ready for completion at 1:30.

Mr. Wirin: In the interest of saving time there are a number of things which I can proceed on, but if your Honor prefers to adjourn——

Judge McCormick: No, I prefer to have you do it now.

Mr. Wirin: And we will later, if we don't supply three copies now, see that three copies are furnished with respect to these matters. Now, the next document is the report of the House Committee, of the Hawaiian Legislature, on the 1923 statute. I think that it may be of some help to the Court in connection with it.

Mr. Flynn: No objection.

(The document referred to was received in evidence as Plaintiffs' Exhibit C.)

Judge Denman: How are you marking that?

The Clerk: The Senate report is Plaintiffs' Exhibit C; [fol. 692] the Community Survey of Education in Hawaii is Defendants' Exhibit No. 1.

Judge Metzger: Weren't there two exhibits put in by the plaintiff earlier?

The Clerk: Yes, your Honor. You mean exhibits that were admitted or marked for identification?

Judge Metzger: I thought the two had been admitted.

The Clerk: Two have been admitted. They are typewritten lists, your Honor, and there were two legislative reports, at least hearings that have been marked for identification.

Judge Metzger: Well, there is only one prior to this Dr. Symonds' report? These others I refer to are just merely sheets, I think.

The Clerk: Typewritten sheets, your Honor.

Judge Metzger: Well, I would suggest that should it develop that there are more than you accounted for, that the first two that came in be marked Plaintiffs' Exhibits A-1 and A-2. I could be wrong about them. There may be only one.

Judge McCormick: Is there any objection, gentlemen, to an order being made by the Court that all instruments that have been offered and received in evidence by stipulation, with the oral statement of the Court, may be considered as part of the evidence?

Mr. Wirin: We so stipulate.

Mr. Flynn: Yes, your Honor.

[fol. 693] Judge McCormick: If my associates concur in it.

Mr. Wirin: That would still not meet Judge Denman's point that each one of the judges have a copy available.

Judge Denman: But it will be required that either of these matters be in the typewritten record or three copies which we can use, the stipulation in which the material in these documents is not only referred to but as it is typewritten. If you can't give us three books, you will give us photostats or copies of some form so that each judge has before him all the material at the time of his study before a conference as to a decision.

Mr. Flynn: I may be able to get three books of the defendants' exhibits.

Mr. Wirin: Now, I think it would be desirable to have marked for identification the 1946 statehood hearings, and the document is entitled "Statehood for Hawaii, Hearings on House Resolution 236". Later on we shall submit to the Court portions of it in triplicate.

The Clerk: This will be marked Plaintiffs' Exhibit No. 3 For Identification.

(The document referred to was marked Plaintiffs' Exhibit No. 3 For Identification.)

Judge Denman: Plaintiffs' Exhibit No. 3?

The Clerk: For Identification.

Judge Metzger: It is for identification.

[fol. 694] Judge McCormick: Certain portions will be here offered separately?

Mr. Wirin: That's right, and we will do the same with respect to 1935 and 1937.

Judge McCormick: Judge Denman's suggestion will also apply to that?

Mr. Wirin: Yes, to everything.

Judge McCormick: I wasn't speaking of Judge Denman's suggestion when I made the observation about the record showing affirmatively that this Court received in evidence—there should be a direction by this Court receiving it in evidence.

Judge Denman: Well, that direction was made on this last one which is only marked for identification.

Mr. Wirin: In other words, your Honor, later on we will offer portions of the documents into evidence. Will that be agreeable?

Judge McCormick: That is correct.

Mr. Wirin: Now, there are two other matters. One is, counsel for the defendants, as I understand it, is willing to stipulate with the plaintiffs that in the parochial schools language is taught to boys at the age of twelve in connection with the preparation of those boys to become altar boys. Mr. Flynn says he studied Latin for that purpose when he was ten, but thinks that the age level has been raised since then. Our information is that at the present time the age is twelve.

[fol. 695] Judge Denman: He was taught Latin.

Mr. Flynn: Not the normal reading and writing and understanding, but the memorizing of Latin for the purposes of the church. I so stipulate.

Mr. Wirin: I assume that you will agree that the teaching of Latin in that comes within the statute, if it is to more than one person at a time.

Mr. Flynn: No, I don't know that I will.

Mr. Wirin: Now, there are one or two other matters. We'd like to read into the record,—and there is no objection on the part of counsel—this one statement by Oren E. Long when he was superintendent of public instruction, and another statement by Governor Poindexter in connection with a language school situation. I will read the following:

> "Territory of Hawaii, Department of Public Instruction, Honolulu, July 31, 1936.
>
> "Hawaii is justly proud of its public and private schools. They determine the type of community life which we enjoy, and more than any other influence excepting that of the home they give us standards of citizenship and a law basis for social progress. Among these educational institutions the Mun Lun Chinese School has been outstanding."

That is one of the plaintiffs in this case.

> "For 25 years it has played an important part in the development of Hawaii. As a result of its program [fol. 696] many thousands of young citizens have become familiar with the language and culture of China, one of the greatest civilizations of history. It has also contributed to the spirit of understanding and good will which exists in Hawaii, to the social and economic efficiency of our young people and to their personal happiness and well being.
>
> "Because of our kindred interest in the youth of Hawaii, I wish on behalf of the public schools to congratulate the Mun Lun Chinese School on the observance of its 25th anniversary and to express the hope that it will continue for many years to serve the best interests of this community.
>
> Oren E. Long, Superintendent of Public Instruction, Territory of Hawaii."

The next document which I propose to read into the record by stipulation is on the letterhead of the Territory of Hawaii, Executive Chambers, Honolulu, dated September 14, 1936, to the officers, directors and members of the Mun Lun Chinese School, Honolulu, T.H.

"I take this opportunity to congratulate the Mun Lun Chinese School on its 25th anniversary. It can well be proud of its many achievements after its 25 years of service to the Chinese of Hawaii. But that is not all, [fol. 697] for its services also include its contributions to other members of the community and other nationalities. It has always strived to create a better understanding among the races by cooperating with them whenever occasion called. May the school continue to uphold its splendid tradition of servicing this community, thereby enriching its own history and bringing honor to this Territory as well as to the school.

Very truly yours, J. B. Poindexter, Governor of Hawaii."

I think perhaps that is all at this time.

Judge Denman: We will take a recess until 1:30.

(The Court recessed at 11:25 A. M.)

[fol. 698] Afternoon Session

MEDORAH E. SMITH, a witness in behalf of the Defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Flynn:

Q. Your name is Medorah E. Smith?

A. Yes, Medorah Smith.

Q. And do you have an occupation at the present time?

A. I am a retired psychologist and university teacher.

Q. And university teacher?

A. Yes.

Q. And you have your doctor's degree in education in psychology, do you not?

A. Yes, majored in psychology, minored in education.

Q. Now, Dr. Smith, would you give us just briefly an outline of your own college education and graduate education?

A. Education, I had my high school and college work mostly at Fargo College in North Dakota and my graduate work—where I got the A.B.—and my graduate work at the

State University of Iowa, most of it where I got my M.A. and Ph.D.

Judge Denman: Is that in education or psychology?

The Witness: The M.A. was majored in education, minored psychology, and the Ph.D. was majored psychology and minor education.

Q. And you have been engaged in the teaching profession here in Hawaii, have you not?

[fol. 699] A. Yes.

Q. Will you give us a brief outline of your work in that field, Dr. Smith?

A. In education, I have taught over thirty years, five years in China, seven in rural grade and high schools on the mainland, of which one year was in a Bohemian area in Iowa, where the people were almost all immigrants, and spent about five years as a research assistant in the State University of Iowa, and left a position as acting head of the psychology department at Simpson College to take up the position here with the Territorial Normal School in 1927. When the Territorial Normal School was amalgamated with the University, then I was transferred to the University and taught there until, for sixteen and one-half years, until I retired in February, 1944, on account of health.

Q. Now, in the course of your professional career, Dr. Smith, have you had occasion to make any studies or research into the question of bilingual instruction in elementary schools?

A. Yes.

Q. You have brought with you some of the material you assembled in that matter?

A. In 1930 and '31 I was working on the problem of direction of reading, to try to determine which was the more natural direction of reading for children. And finding that [fol. 700] the—started with pre-school children, continued—started with pre-school children who couldn't read—finding that the children who came from Oriental homes showed a difference in their preference for reading pictures. I used a test that had a square block of 25 pictures and asked the child to tell what the pictures were. And noticed which way he went. When the children came from Oriental homes, the little children showed a great deal of uncertainty and had no particular plan. But after they began to get to a point where they are having stories read to them, and

so on, they began to indicate a regular direction. And after they entered school, then I found that the children, some of them, read the pictures in the horizontal direction from left to right, as people studying English do, and that others read it from the vertical direction, from right to left, as the Oriental languages are written. I found that that still held to some extent with the Normal School students who had been to foreign language schools, that they might use a vertical direction. There were very few who hadn't who would use a vertical direction, and those generally explained the fact that they read that way because they had a lot of practice in mathematics running up and down the column. So I carried it on then to try to find out what the effect of the foreign language school had on the children. It was required, visiting a lot of schools, to get a hundred schools, to get a hundred school children who had not been [fol. 701] to foreign language school, to match the hundred who had been, by race, age, sex, and intelligence, so that I finally got a hundred children and found that the children who had not been to foreign language school toward the end of the year made over twenty, did over twenty per cent higher score on reading, on the reading tests, than the children who had been to foreign language schools. So then I took a small group, not enough to prove anything, but just to try to find out why, and having given all of these children, and even more, the orientation test, which is called the "picture blocks", I found that the children who went to foreign language schools showed more confusion to that. We gave it to them twice. And they showed their confusion by not following any distinct pattern as frequently as the other children did, by sometimes, in one trial using one pattern and in another trial using the other, and the children who had not been to foreign language schools showed less confusion. Then when we took this whole group for intensive study I found that the children who attended foreign language school regularly showed over twice as many errors of reversal, that is, confusing "b" for "d", reading "o-" for no, and so on, words that are written in two directions. They made over twice as many errors of that type, indicating that the reason for their delay was not anything to do with their background at home, because that had been taken care of by the matching case, but because of their own confusion in the two reading directions that they [fol. 702] were having to learn at the same time. By the

way, this study required some attention on the mainland when I reported to the Academy of Science, local Academy of Science, on the study, and it was written up in Science News Letter by Marjorie Vanderwater, who, rewrites all the psychology for popular consumption, and she illustrates how the different styles of reading would be, and suggestions. If you found these samples puzzling, imagine the bewilderment of the six-year old child in Honolulu who starts to school and immediately is faced with the problem of trying to learn two languages, one beginning at the left on the top of the page and going east, and the other starting at the top right and going south.

Then I had two of my Masters' candidates in carrying out their studies, their theses, drew distinctions between the children who were, the young people who were going to foreign language school, had been to foreign language school and those who had not, and the difference in favor. Ayako Kono in a thesis dealt with the reading ability of children of Japanese ancestry in junior high school, and she found a style at that level, a slight advantage for those who had not attended. Of course, almost all of hers had begun, must have begun at six years old, because there is practically no—I had a terrible time to find among my hundred who didn't——

Judge Denman: This is Japanese?

The Witness: This was Japanese, but Japanese had the [fol. 703] same difficulty as the Chinese in writing. They both write their written vertical, and from left to right is their usual way of writing. Of course, there are a few texts in arithmetic, texts that write horizontal because of the difficulty of translation. I have seen a very few of them.

Judge Denman: You mean with the Arabic numerals?

The Witness: When they are using Arabic numerals. The Chinese numerals are not easy to use. You see, I was born in China and I have studied Chinese, so that I know of some of their difficulties. Also, another candidate carrying out a thesis of dealing with the university students, is Kenneth Ching. He died in the middle of his thesis, and we finished up his work for him. And he had differentiated between the ability of the university student who had been to foreign language school and who had not. In college aptitude there was a test, there was a difference in favor of those who had not been to foreign language schools, even at that level. It was slight, but it was there for both groups.

Of course, by that time, however, curiously enough——

Judge Denman: This is aptitude in language?

The Witness: No, entrance tests for the college.

Judge Denman: You mean over the whole area of the tests?

The Witness: On their final score that admitted them through to the university, those who had been to foreign language school were a little lower than those who had not, [fol. 704] but the ones who had—however, those who had been to foreign language school had a higher grade point ratio, which would indicate that there was only the most diligent student who had been able to overcome the difficulty they had in order to get to it, to make the university.

Judge Denman: What credit did an applicant to the university get for mastering other languages than English?

The Witness: He didn't.

Judge Denman: He didn't get any credit?

The Witness: No, not unless he did it as a university course.

Judge Denman: I am talking about an entrance.

The Witness: An entrance is not—the test is simply a test that is a mixture of intelligence test and some of the things any student, no matter what subjects he had studied, would get always. The university students who had been to foreign language school do relatively better on every part of the test than those who had not, than the part that is most—there is one part that they do extra well; better than the others do, and that is the part that deals with translation, with the new language. Virginia McBride, in her thesis that was completed shortly before I was transferred to the university, also found that the children who had been to foreign language schools were a little, not quite so up in their reading as the others. So that that difficulty [fol. 705] continues throughout. Yoshioka, in California, comparing children who had been, testing children on intelligence, using both the Japanese for translation and the English translation, original English on the intelligence tests, found that they were retarded in both cases. The children were nine to fifteen years old and the younger children were much more retarded than the older children. He believed that the retardation was due to the fact that they had not reached a mental stage which was required by bilingualism. Buswell, in 1927, comparing students who started French in elementary school with those who

started in high school and college, found that those who had waited until high school and college made much more rapid progress than those who had begun in elementary school. And Verheyens in Belgium, comparing children who started a second language after ten or eleven—otherwise these children were exactly the same as the ones he compared them with, those who started earlier, about the time of school entrance—were much less handicapped by their bilingualism than those who had begun earlier. It is not only my own research——

Judge McCormick: What studies did Edith Van der Water make?

The Witness: Van der Water, she just was quoting from the studies that I made.

Judge McCormick: She didn't make any independent study?

The Witness: No, she is just drawing her conclusions [fol. 706] from the study. But I was interested to notice how she spotted the thing which I felt was the basis, the way I felt the difficulty arose here, though it was not in the manuscript, not brought out in just that way in the manuscript that was sent to her. She didn't have the complete manuscript, just the report to the Academy of Science.

Judge McCormick: When did she do her work?

The Witness: Oh, she is just a science writer that writes for Science News Letter, for us who are too technical in our writing, to try in the Science News Letter. Science News Letter tries to get the popular layman, the one who is not technical. But she understands the psychology. She is college trained and she understands and had special work in psychology, so she understands the psychology writing and can draw conclusions.

Judge McCormick: She is an authority?

The Witness: Yes, Science News Letter gives her three-fourths I think, roughly estimated, about three, three-fourths of their psychological writing that they want to have put into popular form.

Q. Dr. Smith, have you made any study of educational authorities in other countries in the world concerning the specific question of bilingual instruction in the grade schools?

A. Yes, I have. In Toussaint's Bilinguisme et Education, a Belgian writing in French, surveyed the practice in

countries where bilingualism is a problem. And he found [fol. 707] in his book, *in his book*, authority for most of this. And then I myself was in Scandinavia in 1939, or I would have gone further. I was planning to go to Belgium next. In Scotland in a Gaelic speaking community, where everybody speaks Gaelic, the children are allowed to use Gaelic in the schoolroom, but they are not permitted to start learning to read and write Gaelic until they are ten years old, at which time they are reported to make very rapid progress because of the delay. In Sweden it is the fifth school year in which they are taught German, which they feel is essential for every Swedish child to know and the eighth school year when they start in English, taking care that they do not start with two languages at the same time, even if they are so similar. In Switzerland the second language started in the upper primary, and the children are in Geneva, for instance, which is French speaking, the children start in the French school and are taught in French unless their parents prefer to send them to a German school and then at ten years also at the end of their primary. It depends on just how swift they are going along, then they start German. And vice versa in Berne. In the Italian part, the Roman-speaking area of Switzerland, they have their French, which is the second language, and which they start at ten. If there is a third language, that is to wait until later. So they will not confuse the two languages. It is the starting at the same time that is particularly disastrous.

[fol. 708] Judge Denman: In each one of those areas, in Switzerland, there is a basic family language?

The Witness: Yes.

Judge Denman: German-Swiss, Italian-Swiss and French-Swiss?

The Witness: Yes.

Judge Denman: So that you have in the area where French is a basis, a postponement until ten years of age?

The Witness: Yes.

Judge Denman: Similarly in the other areas?

The Witness: Yes.

Judge Denman: That is to say, they don't intrude on the parental language until ten years of age, the school system?

The Witness: Yes.

Judge Denman: Is there any prohibition against teaching it through teachers and others?

The Witness: The parents can send their child to a school using the opposite language if they wish. But he cannot have him go to both. And, of course, they have not, like we have, only one language that is official. They have three.

Judge Denman: They still have the Italian in Switzerland?

The Witness: Yes.

Judge Denman: Is Italian still a governmental language?

The Witness: It is one of those. Of course, English and German and French are more important because they [fol. 709] are in much larger area that speaks it. That is, I cannot say the exact present, but at the time, pre-war, I don't know what the war has done, but up to the war time that was true.

Judge Denman: Do you know whether in any of those countries spoken of is there any law against a parent having a tutor teach to children a foreign language?

The Witness: I do not know. Well, I know in Sweden, for instance, I met on the train a little girl who had been six years old, had been spending the summer in France, so that she could pick up some French, but she was not going to school. Her parents also talked English to her because she could. They tried to get her to speak a few words of English to me. Only in Luxembourg and Belgian Congo, of all the countries that Toussaint tried to cover, is a second language taught earlier. They think it is a great handicap that they have to use two languages, but they are such a small country, so close, that they have to.

Then you have Saer in Wales, an authority for that in Wales, who points out that according to his researches, the growth of vocabulary is relatively slow between five and nine years old. Then it increases rapidly, so that the delay of the acquisition of a second language should be delayed, the beginning of the acquisition of a second language should be delayed in the schools until that age, about nine.

Judge Denman: Isn't it true that the gathering of a [fol. 710] vocabulary is limited in any language?

The Witness: In any language.

Judge Denman: Even the native language of the people?

The Witness: It is in any language. She was studying both. In any language it is slower from five to nine years old than afterwards. Mockli, the inspector of schools in the Canton of Berne in Switzerland, confirms that the

satisfactory possession of our own language is the first consideration of the school that is profitable to another one. And the plan of the official schools is that they ought to wait for the beginning of a second language until they are eleven or twelve years old. And the supervisor of the schools, a university professor in France, speaking of the difficulty in Alsace-Lorraine, says that the children should delay even longer. He would prefer that they wait. In a study carried out by Cole & Thorp, surveying the condition of starting another language in the schools, it is pointed out that there was a tendency to delay the study of any foreign language until the ninth grade. Vasconelles, in France, believes that the children should wait until they are twelve years old for their second study, in a report of the Committee on Modern Language in Great Britain, that the pupil is not right for the reflective study of language and if an interest is too dissipated if begun too early so that the child loses interest. And I have had a good deal of personal evidence from students who have spoken to me of their experiences in foreign language schools which began [fol. 711] when they were very little, and they soon lost interest in it. And if they would wait until they were older the children would probably be more willing to attend longer. And in the school that I taught in this Bohemian area, where the children did not go to any foreign language school, there was none there, they came from homes that spoke Bohemian or Czech, and some of them to school not knowing any language, not knowing any English at all. Their home language was so strongly Czech that when I visited one of the directors of the school I had to go armed with a knowledge of Bohemian methods to ask if he was at home because his wife couldn't speak a word of English. And so the children certainly were getting about the same situation there as here. But by the second year of school their English was much better than our children here. And when I was teaching girls in China——

Judge Denman: That would include Portuguese children and the others?

The Witness: Well, the Orientals are behind the Portuguese. Portuguese has practically been given up. They hardly use any Portuguese. Portuguese children's language is worse after they start in school.

Judge Denman: You have had a chance to compare.

The Witness: Besides, the language is more nearly alike.

Judge Denman: Portuguese is more nearly like English [fol. 712] than Czech. Czech is a Slavic language. For instance, you can get somewhat the same word——

Judge Metzger: On account of the Latin derivatives, isn't it?

The Witness: There is a good deal of the Slavic and Russian——

Judge Metzger: I mean, as to the Portuguese.

The Witness: Oh, the Portuguese is the Latin derivative, and English also is. When I was studying the pre-school children that the Portuguese children at six were worse than five in mixing up two languages. They began to confuse them at six because they spoke so little Portuguese at home, only using a few words, like the Portuguese words for mother and aunty, for grandmother and grandfather. You could tell that because it was their grandparents that were teaching them the Portuguese. The older they grew, the less Portuguese they learned. When I was teaching in China, girls who had begun studying Chinese at high school age, they made more rapid progress than they do here. They were already reading "King of the Golden River", which is a fifth or sixth, very stiff fifth grade reading. Our fifth grade children, many of them who have been to language school, couldn't read that. They were making more rapid progress. I did not say that they were better because they only had during the school hour—their progress was much more rapid because they were older girls. They [fol. 713] didn't begin until they were ready for high school. Although the school was not under government auspices, it was following strictly the governmental——

Judge Metzger: Well, that would follow in the teaching of any subject, wouldn't it? They could assimilate it and make more progress at nine in any subject than they could at six?

The Witness: Yes, it is true, but they would not have been burdened with trying to do the two things at once. Very few educators would advocate to any person at any age starting two languages at the same time. You will get confused. And even now when I try to recall some of my almost forgotten Chinese, why, I will swing in a French word when trying to think of it.

Judge McCormick: Doctor, do the studies show any experiences in Holland at all?

The Witness: In Holland, well, I simply referred to the

necessity of their having schools of two kinds because they had allowed both two languages, but I don't know any other. I don't know any very special study.

Q. Dr. Smith, do you have any opinion as to whether the study of a foreign language by children in the early grades, specifically the first four grades in elementary school, is likely to cause any emotional disturbance or mental confusion?

A. Simply that the children who are trying to learn two languages at the same time are apt to become confused [fol. 714] because of the forgetting, such as in that study where the reading is built to show that there is confusion between directions tended to bother them in learning to read, so that they would sometimes read their English and the Chinese from right to left, instead of left to right. And that is going back to the fact of the difficulty of learning two languages and carried out some studies on bilingual babies who were learning to speak a language. Take a few instances in which case a child was brought from a bilingual area to a monolingual area, and he stopped talking because it was altogether too confusing for him to know that the word which he used to say for milk didn't bring in any milk, because the people didn't understand it. And in instances mentioned in Mental Hygiene of a small boy who had been kept, brought around to different countries in Europe and was so confused in his speaking—well, first he had, his parents were American, first he had a German nurse, and then he had a French nurse, and I have forgotten just the exact sequence, but he had both and then he was brought to the United States, and when he was about five or six years old he stopped talking altogether. It was just too much to try to learn a third language. He had the confusion of a child trying to learn three. Now, of course, there are cases where a child, a baby learned two languages, but Mamma talked one language and Papa talked the other. And the child was started in both. He was a child—a child must be of exceptional ability if he is to learn two languages [fol. 715] at the same time.

Judge Denman: Well, now, this thing has gone on in Honolulu for a great many years. The testimony here is to the effect that there is a retardation, a certain number of months at the end of a certain period of time, and then there has been talk of confusion. There are no statistics in which I understand any credit is given to the accomplish-

ment of the two languages. Do you know of any considerable number of cases of neuroses that reached a point that required medical attention in regard to the children that have gone through this training and have failed to master the strain?

The Witness: No, that hasn't been in the line that I have worked on and I couldn't answer that question.

Judge Denman: Did you ever hear of any statistics of any kind showing the mastery of this difficulty which is given them, two languages, but has found them behind some months at the end of the tenth or eleventh year of a child's life, which has produced any illness of a noticeable kind?

The Witness: I remember one case that came to my attention of a small girl in the first grade who was going, who started in the first grade of our normal training school some years ago, who was attending, starting to learn to read, when she, when her teacher discovered that she was losing weight right along, she suggested to the mother that the child be not kept under such strain as the extra hours were [fol. 716] necessary for going to foreign language school. So the mother took the child out for a month. And the child gained nicely. So the mother thought, I guess she's all right now, so she put her back and the child lost again. So the teacher urged her and her mother kept her out for the rest of the year until she had made a little better progress. I don't know what happened the next year.

Judge Denman: That is the only case you recall?

The Witness: Well, I have been working, you see, more in a different line, more with university students, although I carried on a very extensive survey with pre-school children, but there in trying to find out what their handicap in language was, and not what the nervous strain was, because I had to use students. I could not understand these babies, so I had to call on students to investigate their language progress of the children in their homes. I had over a thousand cases, and they were very badly retarded. Although there were children who spoke about as well as a child on the mainland did. When we took the haole children, the Caucasian children who were only supposed to use one language, excepting if a maid happened to use another language in their homes, they were not, they were about the same as the children on the mainland. But these other children in an area, the Portuguese and Hawaiian, were not so retarded, because they used less of the other

language, but the other children, unless they went to kindergarten, were barely up to three years old in their length of sentences, that is, they used sentences no longer than the [fol. 717] average three year old child on the mainland. I had carried out a study that was my doctor's thesis that dealt with the language development of children, and so these cases here were studied in a comparable manner. But recently in the Manual of Child Psychology, edited by Carmichael in a chapter on child development, they brought data on a whole lot of areas in the United States, and Honolulu bilinguals were at the bottom of any group of children. And the children were also in their—if you are conjugating verbs, one Adams studying on the mainland said that 43 per cent of the verbs that children used were conjugated, inflected in some manner or other. And my study, about 40 per cent were four years old. The average four year old here was 16 per cent for Honolulu children and 10 per cent for plantation youngsters. The complexity of the sentences——

Judge Denman: A condition that has nothing to do, then, with the schools?

The Witness: Yes, it comes before. But the trouble is that if these children are so badly retarded when they come to school, they certainly must have a chance to learn English before they are handicapped with trying to do another language at the same time. They are so far behind the others that if our teachers are to have a chance to bring them up to standard, up to standard of the mainland, they can't have the additional handicap of trying to learn another lan- [fol. 718] guage or else they will never—or else too many of them will never speak good English. Of course, the bright ones will. But the children who are about the average, about half of the children in any group are below average, so that they can't do it with that. And they don't succeed, we found in the big survey we made of English errors, that Dr. Cole and I made of English errors for the project in the university on teaching English to bilingual children, and we found our children were away behind in the length of sentences they used, excepting the children who were in English standard schools, very few of which children go to foreign language school, that they were behind in the first grade, pooling from all areas of the Island. We had thousands of cases. Of course, without the cooperation of over half the schools in the Territory that sent in samples

—over half the schools in the Territory sent in samples in the first grade. They made 278 errors per thousand words. And the five year old children that studied on the mainland made 50 errors per thousand words in oral examples. Our twelfth grade was still making 63 errors per thousand words. That is the average. Of course, an average always means that those did not include—excuse me—83—my sight isn't good. Excuse me. And I can't remember all the figures offhand. In written work the children were succeeding better because in school the children have more of a chance in writing work. So they cut down the 134 errors per thousand words that they made in three grades to 44 per thousand by the time they went to the twelfth grade. So the [fol. 719] work is too much. In English standards they were about, they cut down from 48 per thousand words in the first grade, and there wasn't much difference between the races, down to 30 per thousand in the sixth grade. So they were doing all right. But in their written—they knew how to speak English—the written work wasn't more difficult though they had made a few more errors, but they cut it down from 66 to 44 per thousand.

Judge Denman: You have sixteen, they go to school to sixteen. That is ten years of education, isn't it? Now, at the end of that time, with all these difficulties they have, bilingual or trilingual if you include pidgin, Chinese, English and pidgin——

The Witness: Yes.

Judge Denman: At the end of that period, sixteen years old, how does their language compare, the English language, compare in accuracy, written and spoken, with the average on the mainland?

The Witness: I don't know exactly how on the comparison. I don't know exactly how on the comparison of their tests in their reading. I know that when I got college students that they were less facile*d*, although only the select group——

Judge Denman: You had some statistics on the other matters, but I am asking you at the end of this whole system, bilingual and trilingual, and I suppose, quadlingual [fol. 720] probably in some cases——

The Witness: Oh, yes, Filipinos.

Judge Denman: Now, what is the comparison efficiency in English with the sixteen year old children on the mainland, have you any figures on that?

The Witness: I have no figures on that, excepting simply that the tenth grade—

Judge Denman: Each year there has been a gain, as I understand.

The Witness: At the tenth grade there are still 86 errors per thousand words in their oral speech and 57 per thousand words in the average in their written speech.

Judge Denman: How does that compare?

The Witness: And that is heavier because you get little total of five year olds on the mainland. You are making only 50 errors per thousand words. So they still haven't reached in their oral English—these oral English samples were not the worst that the child spoke either. They were when you knew the teacher was around and he was speaking—

Judge Denman: But when the whole thing is over, you face this extraordinary difficulty that Honolulu has or the Islands have, and then a comparison of averages as between the mainland and these children here, you haven't got that?

The Witness: There have been some studies made. They have taken tests that are standardized on the children. I [fol. 724] remember Mrs. Hendrey's thesis compared children in two of our schools and the children in the non-English standard school were definitely below the standard for their grade. Ayako Kono's thesis on the ninth grade——

Judge Denman: The standard school contact—in the non-English standard schools, contact with the English speaking children was practically eliminated, wasn't it?

The Witness: The majority of the children here do not attend English standard schools. That is a small percentage.

Judge Denman: But it draws from the school the contact with the freer English speaking children?

The Witness: Yes, and are going, starting to eliminate them according to the last scores. I just read—I have here one thing on Ayako Kono's thesis. The children were about two years retarded at the ninth grade in reading ability. That is not quite the year you asked for, but it is pretty close. About two years retarded in reading ability. And without the figures here, I know that other studies generally—let's see—McLaren's thesis on Molokai and some of the others, the children are almost all retarded in reading ability.

Mr. Flynn: If your Honor please, I might just save a little time. A great deal of that information is in the Community Survey, the testing results, including the twelfth grade, which would include most of the individuals at the senior high school level.

[fol. 722] Q. Now, Dr. Smith, do you happen to be a member of any educational or scientific or psychological society?

A. Yes, I am a Fellow of the American Psychological Association, a Fellow of the American Association for the Advancement of Science, a Fellow *for* the Society for Research and Child Development, and I have been listed in American Men of Science and American Women, and in Leaders of Education, one or two others, I forget.

Q. Thank you.

A. Oh, and a member of Pi Gamma Mu, Honorary Social Science Fraternity.

Mr. Flynn: You may cross-examine.

Cross-examination.

By Mr. Wirin:

Q. Dr. Smith, as the result of questions by Judge Denman, you gave one case of a neurosis which was the result of attendance in a language school?

A. Not of neuroses. It was just a physical condition.

Q. Physical condition?

A. Yes.

Q. You wouldn't call that a neurotic condition?

A. Oh, no.

Q. Do you know, then, there is no example that comes to your mind of a serious neurosis as the result of language school attendance?

[fol. 723] A. I know of no study where the source of the neurosis, where that matter was considered. It could have been a factor. But I am not, I haven't done very much in abnormal psychology here, so I can't answer that question.

Q. Well, now, Dr. Smith, towards the last years, up to 1941, were there or were there not about five thousand children attending foreign language schools on the Islands annually?

A. I do not know the number there were.

Q. Well, would it be approximately that number?

A. I have no idea. I don't know the school population.

Q. Would you say that the language schools have been in existence on the Islands, particularly the Japanese schools, for approximately forty years?

A. Well, I didn't come here until 1927. I know they were in existence when I came and they were in existence until 1941. The history of education is not so extensive as to recall offhand. I know that it was some years before.

Q. Now, Dr. Smith, you gave us some figures as to the number of errors, errors per one thousand words?

A. Yes.

Q. Which were made by children in the schools on the Islands?

A. Yes.

Q. And I think you indicated that the proportion of errors was greater by them than by children in comparable [fol. 724] grades on the mainland?

A. No, not in comparable—well, yes, in comparable grades, because they were making more errors than five year old children who were not even in school yet.

Q. These errors which were being made were being made by Porto Rican children and Portuguese children, were they not?

A. Oh, it was all races.

Q. General, was it?

A. All races. I do not know. We did not get around the data that was accumulated, but we did not get around —the data that was accumulated—we did not get around to segregating them except for one study which was segregated for Japanese children. There may be groups, for instance, like I would suppose the Porto Ricans who have recently come here, that might make even more errors, but the Japanese children made most errors of all in the study that I made of pre-school children, the six year old Japanese children made more errors than any other group.

Q. You say that the Porto Rican children, because they are more recent on the Island, they might have made more errors?

A. That is simply a matter of opinion. I really shouldn't have said anything about it. I don't know.

Q. That's all right.

A. I just know because there would have to be some [fol. 725] average to pull down and some of the others did worse.

Q. Dr. Smith, you know that Porto Rican children did not attend foreign language school?

A. Oh, yes.

Q. They did attend?

A. Maybe they did better. Maybe they did better.

Q. My question now is——

A. I don't know.

Q. You do not know whether Porto Rican children attended foreign language school?

A. As I say, we did not have the time to segregate the amount of material from the different races. That was a matter I had planned for a Master's thesis for somebody some day, but we didn't get around to it. I had to quit.

Q. Dr. Smith, isn't it a matter of common knowledge on the Island, that the Porto Rican children do not have foreign language school to attend?

A. No, they don't have any.

Q. Do you know whether or not Hawaiian children attend any foreign language schools?

A. A few do, because I had university students who had attended, part Hawaiian, who had attended foreign language schools.

Q. In which Hawaiian was taught?

A. I do not know, but they said they had attended foreign [fol. 726] language school. I cannot recall, but they had attended foreign language school and they were not doing as well, did not have as high scores as the other university students.

Q. Dr. Smith, isn't it a matter of common knowledge and a matter within your own knowledge that of the various foreign language schools which you maintain by far the most of them were Japanese?

A. Yes.

Q. So some were Chinese and very small, a handful of Koreans?

A. I believe that is so.

Q. And those were all the language schools maintained on the Islands in the last forty years?

A. I don't know whether there might have been another.

Q. Do you know when the Korean language schools were closed?

A. No.

Q. You don't know they were closed in 1940 or a year or two——

A. I presume they all were closed at the same time.

Q. You don't know whether or not the Korean language school was closed prior to the Chinese or Japanese language school?

A. No, I don't know.

Q. Now, as you were testifying, I thought I heard you [fol. 727] say that with respect to one of your studies the group was so small so as not to prove anything. What was that study?

A. That was—in investigating the type of error that the child, that the children made, it was for showing that there was confusion between those who attended foreign language school and not. The group was adequate. It was over two hundred altogether, nearly three hundred children. But for the small one to find out the matter of the exact errors that they made, that was only the one class that was available at the Territorial Normal School for close study. But when you find that the confusion exists in a large group of children, then what we were seeking there was just why that confusion existed and why these children who did so much worse in their reading—well, they would be 25 per cent behind. If the others were 25 per cent ahead of them, so they were 25 per cent slower in learning to read than the others. Then the fact that these errors of reversal were higher in the smaller sample study would explain part of the other. In fact, the tests indicated, because we used one which had a good deal of confusion between words—that did indicate that that was part of this source of error.

Q. Well, that was the test with respect to such few that you don't think it is scientific?

A. No, the one that indicated the confusion, that was not the one. It was the one that showed the matter of too [fol. 728] high reversals. You could say there were three parts. I studied the average reading ability of children, and there were enough cases so that the chances are, 99 out of a hundred chances, statistically speaking, that there was a true difference between the two groups in learning to read in the first grade.

Q. I think you answered my question.

A. Then the second part was the orientation test in which the children who did not attend foreign language school did better, and the foreign language attendance showed more confusion. Then the third was the matter of exactly

the type of error that the children studied, made. But the others did not learn to read as well and that was just simply to find out just why they didn't read as well. And a sample, when you know the facts, that one group is much better than the other, a small sample will be indicative of the type because you can use it as further explanation.

Q. Now, Dr. Smith, in connection with the statistics which you gave, showing a larger amount of English errors by children in the schools on the Islands, than comparative grades on the mainland, would you say or would you not say that the prevalence of a pidgin English in the community was or was not a factor explaining that difference?

A. It is a partial factor, but it shouldn't result in the—if it was alone it shouldn't result in the fact that the child uses shorter sentences.

[fol. 729] Q. Now, with respect to the matter of pidgin English——

Judge Denman: Isn't pidgin in shorter sentences?

The Witness: Some sentences are shorter, some are longer, and some are exactly the same size. Papa no say. Papa isn't home, three words each.

Judge Denman: Papa is not home. No savvy. I do not understand.

Judge Metzger: Papa no stop.

Mr. Char: What is time?

Judge Denman: Pidgin is an abbreviated language.

The Witness: Beg pardon?

Judge Denman: If pidgin is an abbreviated language, certainly our pidgin in San Francisco when we talk with all of our Chinese servants is an abbreviated language.

The Witness: It leaves out some. It is partial——

Judge Denman: So that would it be proper to expect children speaking pidgin that they would be inclined to shorter sentence language?

The Witness: Well, we go make one puka. That is an exact sample of one of the sentences. It stands for, "We made a hole." Go make, which is very common. Try make this for "Do this." You have some that are longer. I measured samples of common words. Come, Shirley, ngo de (we) play school. That is not pidgin. It doesn't make the sentence bad. The Chinese people here know what that child was saying. And that happens to be one [fol. 730] of the Chinese words I remember.

Q. Well, now, Dr. Smith, pidgin English is prevalent among Porto Ricans, Hawaiians?

A. Oh, yes.

Q. Portuguese, is it not?

A. I can't say anything about the Porto Ricans. We didn't take a sample of them for the work. They were so few. They are so few comparatively in the territory that we only took samples of—the samples we studied were of—of course, in our big survey we had a few Porto Rican children, but I know there were very few cases which we listed. There were so few all the way. But we decided for this preschool study, Japanese, Chinese, Hawaiian, Portuguese, haole, Korean, and then a plantation group. There were two plantation groups and one rural Hawaiian group.

Q. Did you find pidgin English prevalent among the Hawaiian group?

A. Well, they didn't speak correct English, some of them didn't. They get mixed up with the other children they play with. They spoke better English, though, the Hawaiian children did. They used a great deal more English words.

Q. What about the Portuguese children, do they speak pidgin English?

A. Some of them did, some of them didn't. They spoke better English. They used longer——

[fol. 731] Q. The quality of the English depends on the length of the words used?

A. On the length.

Q. Of the phrase? Abraham Lincoln's speech, I understand, was not too full of words.

A. The length of sentences has been used for tracing the development of children's speech, not only by myself, but by a number of investigators of children's speech on the mainland, by McCarthy, by Davis, by Fisher, by Young, by Adams. Those are the ones that I recall at the present. They all find that as the child improves in his use of language, the sentences grow greater, increase. And that increase has been studied in written language for people of school age and adults and the same thing continues as the person grows older, more mature, more mature in his speech, he uses longer sentences.

Q. Isn't that true where the purpose of education is to make a professor or a lawyer, rather than to make a worker who is a good citizen?

A. Oh, no, that was just an ordinary public school, ordi-

nary public schools that were studied. They were making the gain there. I didn't bring that reference with me, but it is a table given in this Manual of Child Psychology that I referred to once before, Carmichael. It is a very heavy, thick book.

Q. Let's go to McBride's study for a moment.

A. Yes.

[fol. 732] Q. By the way, your article on the effects of bilingual background, and so forth, was published in May, 1942, is that correct?

A. I don't remember. I have one here. I can look. If you say it is that, if you say it is that way printed there, well, that's all right.

Q. Do you recall—you mentioned Virginia McBride in your testimony?

A. Yes, I read that.

Q. Do you have your article here, the effects of bilingual background, do you have it handy? Will you look at Page 363 and let me ask you first, what is a grade point ratio?

A. A grade point ratio was the grade that the student made, the average grade on all their subjects after they had come to the university.

Q. Do you agree with Miss or Mrs. Virginia McBride's conclusion that the grade point ratio of the student averaged higher for those who had attended foreign language schools than those who had not?

A. Notice the first statement. You are omitting the first statement.

Q. Well, suppose you read.

A. "Also found the scores of the college entrance tests of Chinese and Japanese students who attended foreign language schools slightly lower than the scores of those who had not."

Q. Read the rest of it.

[fol. 733] A. Remember these. Now, we know very well——

Q. Won't you read the rest of it?

A. —that a small percentage of students of—a small percentage of students relative to the whole population of Chinese and Japanese ancestry than those who enter the university, than those whose are of Caucasian ancestry, who enter the university or go to the university on the mainland. Now, you say in the university on the main-

land, in both cases. The students are, therefore, a more selected group. If they make a highest grade point ratio after they come to the university than the others, it is because they are more highly selected groups. They have a harder road to follow. They had to be very good students if they have graduated from high school and also attended several years of foreign language school. A good many of the students who attend the university were not very successful in foreign language school. For instance, you will find one student stating, "I attended Japanese language school for ten years and I learned very little". She was a student at the university.

Q. Now, Dr. Smith, you have given us an example of one such case. Do you, or do you not agree with Miss or Mrs. McBride's findings which you quoted in your article?

A. I said I got the same results exactly.

Q. To the effect that the grade point ratio of those students averaged higher for those who had attended [fol. 734] foreign language school than those who had not?

A. Yes.

Judge Denman: Does that refer to the grades after they were in the university?

The Witness: After the university.

Judge Denman: Or does it refer to the entrance grades?

Q. Presumably it refers to after they entered?

A. Yes. And at the entrance they are lower. There is a weeding out, too, that occurs of students who can't keep up. So our grade point ratio couldn't follow the student who flunked. And that may be part of the reason for the higher grade point ratio.

Judge Denman: You don't think that the flunked student could have been dumb Nordic or dumb Japanese?

The Witness: I don't know about that. I couldn't get very much data. The office didn't give me data as to racial proportion of those who flunked that year that Kenneth Ching started the thesis. We were carrying on a thesis of a young man who gathered the data and had died before he worked it up. It was impossible to do a few of the things that we would have liked to have done.

Mr. Wirin: That's all, Dr. Smith.

Mr. Flynn: I have no further questions.

(Witness excused.)

Mr. Flynn: May we have a short recess, your Honor? [fol. 735] Judge Denman: Is your case submitted?

Mr. Flynn: It will be after I put in one extra documentary bit of evidence.

Judge Denman: We will take a recess for ten minutes.

(A short recess was taken at 3:00 P. M.)

After Recess

Mr. Flynn: I would just like to advise the Court, or rather, call the Court's attention to one of the early pleadings filed in behalf of the defendants, namely, the objections to motion for allowance of preliminary injunction, at which time there was an affidavit attached to said pleading executed by one Dr. Benjamin O. Wist, Dean of the Teachers' College of the University of Hawaii. He has not appeared in this proceeding because he is seriously ill in the Naval Hospital, and I would like the Court to be so advised.

Judge Denman: This is an affidavit in opposition to the issuance of the injunction?

Mr. Flynn: Yes. And in support of the defendants' pleading.

Judge Denman: Any objection?

Mr. Wirin: No, your Honor. I understand Counsel is merely calling the Court's attention to the failure of the defendants to produce Dr. Wist as a witness. No effort is being made to produce his testimony, and that was an affidavit in connection with an application for a preliminary injunction, which is not involved at this time.

[fol. 736] Mr. Flynn: I am not asking that the affidavit be accepted by the Court, no, your Honor. Now, I would like to offer three documents in evidence. The first is an opinion letter from the office of the Attorney General of the Territory of Hawaii concerning the interpretation of Section 1873 of Chapter 31, the Foreign Language Law, referring to the standard tests. And I understand counsel has no objection to this being accepted.

Judge Denman: This is admitted as evidence of an expert or is it offered as simply an opinion, interpretation of the law?

Mr. Flynn: By the official government agency, the Department Attorney General, that's correct.

Judge Denman: Admitted.

Mr. Wirin: The same of the Attorney General, which we claim is not binding as a matter of law. We will argue that later.

The Clerk: Defendants' Exhibit No. 2 received in evidence.

(The document referred to was received in evidence as Defendants' Exhibit No. 2.)

Mr. Flynn: The next is a schedule of some statistical data furnished by the Department of Public Instruction covering three items. First, the number of the Chinese pupils by grades in the public and private schools of the Territory. The second is the extent of teaching of foreign languages in [fol. 737] the public schools in the Territory. Third, the extent of the teaching of foreign languages in private schools in the Territory.

Mr. Wirin: No objection.

Judge Denman: It will be admitted.

The Clerk: Defendants' Exhibit No. 3.

(The documents referred to were received in evidence as Defendants' Exhibit No. 3.)

Mr. Flynn: The final one is a copy of a report to the Governor on bills passed by the legislature, referring specifically to the House Bill No. 395, the report made under date of May 13, 1947, and referring to the bill which required the Department of Public Instruction to make a gradual transition from a dual standard to a single standard school system, the report being made by Roland B. Jamieson, Deputy Attorney General of the Territory.

Judge Denman: What is this, a declaration of a purpose on the part of the educators, or what?

Mr. Flynn: This is only an opinion letter on the bill as passed by the legislature, and counsel will stipulate with me that pursuant to the expression in this letter the Governor vetoed the bill calling for the gradual transition from the dual standard.

Judge Denman: This is the earlier bill?

Mr. Flynn: This was in this past legislature, the 1947 [fol. 738] session, and is concerned only with the standard school system.

Judge Metzger: Wasn't there a message accompanying the Governor's veto?

Mr. Flynn? There was a statement released to the press, your Honor, which I discussed with counsel, which was not an official veto message. It was a pocket veto.

Judge Metzger: But you would have us believe that it was upon the basis of the information in this letter from the Deputy Attorney General to the Governor that the Governor vetoed the bill?

Mr. Flynn: That is correct.

Judge Denman: Now, does this message to him contain statements of fact as to the intent of the Administrator or a statement of the present condition of the law as not requiring the addition of the provisions of the bill?

Mr. Flynn: I am sorry to say it only concerns the present provisions of the law.

Mr. Wirin: May I explain my position? I have no objection, and so stated to counsel, to this letter going into evidence for whatever it is worth. This letter recites, this is an opinion from the Attorney General's Office to the Governor as follows: No legal obstacle exists which, if the bill does not become law, can prevent the Department of Public Instruction from being able to make the transition which the bill attempts to require the Department to make. [fol. 739] I am willing to stipulate—and Mr. Flynn's statement to me is correct—that the Governor vetoed the bill as passed by the Legislature in both houses for this reason, the reason given in the letter of the Attorney General's Office. However, I want to make my position clear, that it is my impression the testimony of Mr. Loper, his testimony was that no program had been instituted, nor was there at the moment any plan for the termination or ending of the so-called standard English schools.

Judge Denman: That is in the testimony?

Mr. Wirin: Yes. However, I have no objection to this document for whatever it is worth, going into evidence.

Judge Denman: It will be admitted.

The Clerk: Defendants' Exhibit No. 4.

(The document referred to was received in evidence as Defendants' Exhibit No. 4.)

Mr. Flynn: That is the conclusion of the evidence on behalf of the defendants, your Honor.

Judge Denman: The plaintiffs will proceed.

Mr. Wirin: Before we call witnesses—and we intend to

call just one witness—there are three items with respect to which the defendants and plaintiffs stipulate. One, that by virtue of military orders, particularly, General Order No. 6, issued by the Military Governor on December 8, 1941, all language schools on the Islands were closed.

Mr. Flynn: May I interrupt? Is it all schools that were [fol. 740] closed?

Mr. Wirin: All schools were closed.

Mr. Flynn: All schools were closed.

Mr. Wirin: Oh, I'm glad you corrected me there.

Mr. Char: Was it March, 1943?

Mr. Flynn: March 10.

Mr. Wirin: Thereafter, and some time prior to March, 1943, the public schools were reopened, but the language schools were under military order closed until March 10, 1943. The law, the instant statute, was enacted in May, 1943. Martial law continued in the Islands until 1945.

Mr. Flynn: October, 1944, a limited form of martial law continued until then.

Mr. Wirin: October, 1944. Another matter with respect to which there is a stipulation, that with respect to attendance—I don't know if I am correct about those dates.

Judge Denman: What is the difference between military government and martial law in the Islands?

Mr. Wirin: I draw no distinction.

Mr. Flynn: It has been fought for a long time and I wouldn't like to say whether there is a distinction or not.

Judge Metzger: What about the Governor's proclamation of February 8, 1944?

Mr. Flynn: 1943.

Judge Metzger: Yes, '43. Didn't that end martial law? [fol. 741] Didn't that end anything you could call martial law? It continued in part, the military government.

Mr. Flynn: I guess that would be correct. The only reason I hesitated to accept Judge Denman's statement in full is that in some of the cases before your Honor military government was given a certain specific meaning, and there was definitely a partial military government. If we are speaking in terms of that government used in occupied countries, there is quite a dispute about that.

Judge Denman: When did that terminate?

Mr. Flynn: That was October, 1944. That was the end of all forms of martial law.

Mr. Wirin: In that connection, Mr. Char just advised

me—perhaps we can have a stipulation—that the language schools were actually occupied, so far as the Chinese schools were concerned by the United States troops until September, 1946. Will you stipulate to that, Mr. Flynn?

Mr. Flynn: Well, your complaint says April, 1946. I will agree up to some time in '46 the schools were actually occupied, although as tenants.

Mr. Wirin: Now, with respect to the attendance at language schools, and referring particularly to the plaintiffs' language school, Mo Hock Ke Lok Po—I am not proud of my Chinese pronunciation—up until 1940, up to and including 1940, 1941, 334 were from the first to the fourth [fol. 742] grade, 353 were from the fifth to the eighth grade, 204 from the ninth to the twelfth grade. Practically no students attending college or university attended the schools. And that these proportions obtain generally in the remaining plaintiffs' language schools.

Judge Denman: Is that stipulated?

Mr. Flynn: I want to clarify it a little bit. That means that they were the pupils in the Mun Lun School?

Mr. Wirin: Yes.

Mr. Flynn: It doesn't mean that they were in exactly corresponding grades in public schools, or anything of that sort, is that right?

Mr. Wirin: I am not asking about that.

Mr. Flynn: The only reason I am asking you that is that you mention university or college students. As to the figures, the first four grades and the second four grades and the ninth to the twelfth grade, we will stipulate what counsel has stated.

Judge Denman: Do I understand that there was a gradation in the Chinese schools which corresponded in age periods substantially with the public schools?

Mr. Wirin: I think that is——

Mr. Flynn: That is correct.

Mr. Wirin: And also these proportions obtain generally in the remaining language schools, in the remaining language schools.

Judge Denman: Now, has it been agreed here as to when [fol. 743] these English tests come after the fourth grade, how often they are administered? Is there an agreement on that?

Mr. Wirin: I think there is agreement to the extent—I think there is no agreement. Our position is that the

evidence is to the effect that no tests as required by the statute have been given or are given. Counsel for the defendants claiming—and I think there is a letter from the Attorney General which has just been introduced in evidence, that the securing of a passing grade in English by the students between the fourth and the eighth grade—that is a deviation from the requirement of the statute, a deviation which the statute doesn't warrant.

Judge Denman: How often does that come, annually or biennially?

Mr. Flynn: We had some testimony concerning that, your Honor, and it was stated that there was no set rule, that tests are now given in all the grades of the public school from time to time, and further testimony that the same tests would conform to the requirement of this law as far as tests to be administered by the Department of Public Instruction is concerned.

Judge Denman: Well, are those tests for promotion or tests for the determination of what?

Mr. Flynn: They are both. The tests are not confined to the end of the year for promotional purposes only. They [fol. 744] are given from time to time.

Judge Denman: So the parent in having his child in a Japanese or Chinese school, or teaching him French with a tutor or within the law in any respect, will never know how long he can engage his child for. That is to say, he may be going for two months in the fifth grade, having his tutor for French, and be stopped by that fact that the test given at that moment showed that he couldn't go on, is that correct?

Mr. Flynn: No, your Honor. That again gets into this matter of interpretation. This letter of ours clarifies that slightly, although not to the fine points that I would like.

Judge Denman: Your statement was that it is from time to time, not as an instance of promotion, but as an instance of an ordinary school procedure, from time to time these tests are given to the children. And I take it when the tests show a deficiency, the child would have to give up the language school if he were then in it?

Mr. Flynn: That gets us into the other question of interpretation of that section again.

Judge Denman: What is your contention with regard to that?

Mr. Flynn: My interpretation is that the child who passes the fourth grade English goes into the fifth grade and can then take the foreign language study and he will not be requested to discontinue it until and unless there is a showing at the end of his fifth grade year that he has [fol. 745] lagged behind in his studies. So the standard test would be enough once a year.

Judge Denman: So from time to time during the year these tests may be given. It doesn't seem to comport with that, because it is when the tests are given, as I understand it, that he loses the right to continue, isn't that right? Or is it on the basis of promotion?

Mr. Flynn: It will be synonymous with promotion as far as all our discussions are concerned about that section, yes. What I said about withholding an admission, that will be only once a year, that there will be only one passing test. Our department presently has some tests through the year, our Department of Public Instruction. I don't think it would amount to more than two or three? Maybe it is on the semester basis, or it might be varied slightly. But in any case, the intention as to enforcement is only concerned with a year at a time.

Judge Denman: Well, the statute with reference to the child failing to pass that test on the third month of the year, what would be his right to continue with his tutor or his language school?

Mr. Flynn: The right would not be interfered with.

Judge Denman: That is the Government's contention?

Mr. Flynn: Our contention. In fact, I think that would be consistent with the facts of the test, that no child is given a failing grade at the end of three months. It is done several times during the year and averaged up, so that [fol. 746] at the end of the year it can properly be determined that the child has a passing grade in English.

Judge Metzger: Now, this opinion of the Attorney General that you put in the letter form—we haven't seen it yet—was that intended as a guide to the Department of Public Instruction as to the construction to be put on the statute as to tests?

Mr. Flynn: I think that was Governor Stainback's intention, but there was no official veto message, and I have therefore been precluded from establishing that. I have therefore been able to produce it for what it is worth, as

counsel says. Unfortunately, the letter will not establish that.

Judge Metzger: I got off on the wrong understanding there. I thought that the Attorney General's Office had given to the Department of Public Instruction somewhere the views of the Attorney General as to the interpretation regarding tests to be put on the statute.

Mr. Flynn: Oh, yes. I'm sorry. I was discussing the other letter. That's in our letter.

Judge Metzger: Yes. Now, of course, there isn't any occasion for the Department of Public Instruction to act on any recommendation as to tests so far as they relate to foreign language schools, because I understand there aren't any in existence now. Now, the Attorney General, who gave that opinion, he goes out of office today.

[fol. 747] Mr. Flynn: Well, this happens to be Miss Rhoda Lewis, the assistant, who stays in.

Judge Metzger: And she is Acting Attorney General?

Mr. Flynn: As of tomorrow she is Acting Attorney General.

Judge Metzger: Until an Attorney General is appointed.

Mr. Flynn: Yes, your Honor.

Judge Metzger: And, of course, as I would suppose in a matter of that kind, which is merely the outline of a policy more than it is a construction of the statute, isn't it?

Mr. Flynn: No, it is an opinion letter filed with the Department of Public Instruction at their request.

Judge Metzger: To construe that statute?

Mr. Flynn: Yes, your Honor. In the outset of the letter it says, "Reference is made to your letter of December 13, 1946, and to our conference of December 14, 1946, concerning the proper construction of Chapter 31, Revised Laws of Hawaii, 1945." And there has been testimony here, I think it was either Dr. Loper or Mr. Meyer who stated that the Department is proceeding with any work that should come to it in connection with the language schools and in accordance with this opinion of the Attorney General.

Mr. Wirin: May I have a word in that connection, your Honor? As I read Section 1873 of the requirement, it places school children in two categories. One, that the children who pass the eighth grade, a child who passes the [fol. 748] eighth grade, with respect to that there is no

requirement of it taking tests. All he has to do is to pass the eighth grade. When he does, he is free from this.

With respect to the group between the fourth and the eighth grade, however, the child must first pass the fourth grade. He has to do that. And in addition,—and this is required of him and is not required of the one who has passed to the eighth grade—in addition he must pass from time to time in each succeeding grade a standard test in English composition and reading conducted under the Department of Public Instruction, attaining a score of not lower than normal for his grade, so that of the fourth grade child there are two requirements, one, that he has to pass the fourth grade, which apparently is the practice recognized, but in addition under the statute he is subject to being given an examination in standard English and composition from time to time, without any fixing in the statute as to when the examination shall be given. Presumably it is entirely in the discretion of the authorities. So that it seems to me, if I may say so, that Mr. Flynn hasn't dealt directly with the problem raised by Judge Denman, because certainly under this statute, no matter what the Attorney General may advise the authorities to do or not to do, with which advice the authorities may or may not comply, depending upon who is the Attorney General, but so far as the face of this statute is concerned, unlimited discretion is conferred upon the school authorities [fol. 749] to give such composition, to give such tests in English composition and reading as they may want to do from time to time.

Judge Denman: Well, Mr. Flynn has answered that. He said that that is not so. He said this is a test that is given for the promotion at the end of the academic year for the next year. So your two positions are stated now. And you may argue later whether you or your opponent is right. And it has been clearly stated by your opponent what this statute is, that it is an examination at the end of the academic year.

Mr. Wirin: Well, your Honor, all I can say is this in that connection, that the languages——

Judge Denman: Let's leave this to the argument of the case. We have got the positions of the parties now stated.

Mr. Wirin: Now, there was another issue of fact with respect to which we have a stipulation, and that is pertaining to the curriculum in the plaintiffs' schools, that the

curriculum with respect to Grades 1 to 4 is substantially as follows, or was in 1941: reading and writing, singing, speech practice, story telling, story telling by teacher, behaviour, including respect for parents, and behaviour and respect for parents instruction are in the form of lectures and illustrations. Occasional games, simple dramas. And there were libraries at the schools for the children in both Chinese and in English.

Mr. Flynn: I am willing to stipulate to that.

[fol. 750] Judge Denman: Stipulate to that?

Mr. Flynn: Yes.

Judge Denman: Now, are you going to have an agreement as to the hours that the child is engaged in other than play? Is the period from three o'clock the school period? What do we understand to be the facts on that?

Mr. Wirin: The fact is that the classes last approximately an hour and forty minutes after school hours daily, with recesses, however, during that period.

Judge Denman: Well, let's get the picture of that.

Mr. Wirin: May I call a witness, your Honor, while that is being explored?

Mr. Char: Well, I understand they start school at three o'clock to 3:45, and you take a *twenty* minute recess until 4:10, and then from 4:10 to 5.

Mr. Flynn: So stipulate, your Honor.

Mr. Wirin: Our further information is that the Japanese school lasted only about an hour. Will you accept that? Although they are not an issue in this case.

Judge Denman: They are not?

Mr. Wirin: Well——

Judge Denman: They are not? Is that your position, that the only schools in issue in this case determining the validity of the law are Chinese schools?

Mr. Wirin: Well, I meant party plaintiffs in this case.

[fol. 751] Mr. Char: The Japanese language school, I understand from Mr. Morita, is just one hour.

Mr. Flynn: I can't stipulate to that, your Honor.

Judge Denman: Well, will you call a witness on that?

Mr. Wirin: Yes.

Mr. Flynn: To the Japanese language school one hour, I wouldn't stipulate, but I do stipulate as to the time of the Chinese language schools.

Mr. Wirin: Dr. Reinecke, as I say, is our only witness, and I think we will get through today.

Judge Denman: Is there anything else you have to offer before Dr. Reinecke goes on the stand?

Mr. Char: I think we ought to offer the Act itself, Chapter 31, which is the copy of the Act itself, which is attached to the complaint.

Judge Denman: Well, we will have to take judicial notice of that anyway. And a copy of it is in the pleadings. And it is not denied.

JOHN E. REINECKE, a witness in behalf of the Plaintiffs, having previously been sworn, resumed and testified further as follows:

Direct examination.

By Mr. Wirin:

Q. Dr. Reinecke, do you have some statistics indicating the number of foreign language schools and attendance at [fol. 752] those schools during the period prior to 1941?

A. I do not have the number of language schools, no. I have it there in my notes.

Q. Do you have the attendance?

A. The attendance? But I think that it would be more to the point to give the percentages.

Q. Well, do you have the percentage? Let's have those.

A. Yes. As of 1936 the attendance at the Japanese language schools was approximately 83.7 per cent of the number of students of Japanese ancestry in the schools of Hawaii, both public and private. For the Chinese language schools, 35.7 per cent, and for the Koreans, 24.8 per cent. I wasn't able to get any figures later than 1936, but I think that for the Japanese and Chinese schools the proportions were not very different clear up to 1941.

Q. Do you know whether or not the Korean language schools were closed prior to the declaration of martial law?

A. I don't have any personal knowledge of that, no.

Q. Do you know from your general knowledge in the field whether or not Porto Ricans, Hawaiians, Portuguese children on the Islands did or did not attend so-called foreign language schools?

A. Very few of them attended the Oriental language schools, very few.

Q. Did they have any language schools in their own languages?

[fol. 753] A. They did not.

Judge Denman: You mean by language schools, an organized school with classes?

The Witness: I mean an organized school with classes. There was a one time very briefly a Portuguese language school, but it proved a failure.

Judge Denman: When you use the word "school", are you using it in the ordinary sense of a building and children and classes?

The Witness: At least a definite place for meeting and a definite teacher, your Honor.

Judge Denman: Well, here we have a curious, novel definition of school. A school is one person and two pupils systematically pursuing any subject. Now, would you venture to say that, or what is your viewpoint on the question of whether or not parents securing the services of one person to systematically teach two members of the family in languages, do you know anything about the number of those?

The Witness: I have no information on that. It is my impression that that did not obtain. Of course, here in the city frequently people obtain the services of tutors, but those I should guess were not often, for the instruction of the younger children.

Q. Well, the figures which you have been giving are the figures pertaining to the formal language schools, that is, [fol. 754] organizations that have a special building where children in comparatively large numbers and in classes gather?

A. That is correct.

Q. There have been no studies made of any kind, I understand, of instances when tutors were employed or retained or arranged for by families?

A. There have been no such studies.

Judge Denman: Now, I understand this law provides for a certain instructor with or without compensation, and a grandfather skilled in the Portuguese language, teaching two or three grandchildren, seemingly will, or will fall within the Act. Do you know anything about that?

The Witness: I do not.

Judge Denman: Or any other language other than English?

Judge Metzger: Do you know anything about neighborhood schools where mothers of children, perhaps in two or three families, join in and teach children in special subjects?

The Witness: I have not heard of any such school.

Q. Now, do you have the figures as to the population of the Islands with respect to various racial groups, including the haole population?

A. Yes. Again using the percentages, rather than the actual figures.

Q. All right.

A. Which might be obtained, of course, from the Board [fol. 755] of Health. This is the Board of Health estimate of the civilian population as of July 1, 1945.

Q. Yes.

A. Would you like those for all the groups?

Q. Well, yes.

A. The Hawaiian and part Hawaiian together, 14.40; the Porto Rican, 1.81. The Board of Health, I might say, combined all the Caucasian groups, while the school records separate them into Portuguese, Spanish and other Caucasians.

Q. What is the figure as to all of the Caucasians?

A. All the Caucasians together in the total population, 34.33.

Q. Consisting now again of what groups?

A. Portuguese, a handful of Spanish, and the other Caucasians or haoles.

Q. What is the haole group as distinguished from the Portuguese and Spanish, do you have that broken down?

A. No. It is not broken down.

Q. All right. What are the other percentages?

A. It is about, I should say offhand, 26 per cent, of the total.

Mr. Flynn: Excuse me. What is 26 per cent of the total?

The Witness: The haoles make up somewhere about 26 per cent.

Mr. Flynn: Which would mean the Portuguese is ap- [fol. 756] proximately 7 per cent of the total Island population?

The Witness: About that.

Mr. Flynn: That is your estimate?

The Witness: That is my estimate. It may be off by one or one-and-one-half per cent.

Q. All right, let's have the rest of the figures.

A. The Filipino, 9.25; miscellaneous, 0.32.

Q. Would you give us Chinese and Japanese?

A. Now, the Japanese, 32.52; Chinese, 5.97; Korean, 1.40.

Q. Can you tell us what proportion—can you tell us in terms of the race, the makeup of the 1943 legislature?

A. Let me see on that. I looked that up and found that of fifteen senators, there were no people, no members of unmixed Oriental blood; two of them were Chinese-Hawaiian; nine of them were Caucasian; out of thirty representatives there were no Japanese, two Chinese, four men bore names which I take to be Chinese-Hawaiian; and fourteen Caucasians.

Judge Metzger: What year was that?

The Witness: That is 1943.

Q. That is the date when this law was enacted, 1943? Now, do you have quickly offhand the portion of the population of Chinese and Japanese together?

A. Chinese and Japanese together? Just a moment.

Mr. Flynn: 38.——

[fol. 757], The Witness: 38.49.

Q. Can you tell us whether or not the Chinese and Oriental population, which approximates 38, a little over 38 per cent of the population, had any representation in the executive department of the Territory?

Mr. Flynn: I am going to object to the question as immaterial. I don't follow even what executive department or what period is being covered.

Mr. Wirin: In 1943. Pardon me.

Mr. Flynn: I will object to the question.

Judge Denman: What is the purpose of it?

Mr. Wirin: The purpose is this, we want to show that although the Oriental population is a very substantial portion of the population, that in 1943 it had practically no or at least very little representation in the Government, and we hope to argue from that that this law was aimed primarily against racial groups, even though in population they are large in number, in actual effect they are minority groups.

and this is the kind of a law aimed against minority groups which runs counter to constitutionality on the minority groups. And we are apparently through with that line of testimony now, but I think it ought to be in the record somewhere.

Judge Denman: You have got your legislature. Assuming that the legislative thing is relevant, just how is your executive relevant?

[fol. 758] Mr. Wirin: Well, the bill was approved by the executive.

Judge Denman: What is that?

Mr. Wirin: The statute was approved by the executive.

Judge Denman: By the Governor. You know what the Governor is. I don't know whether he is a Democrat or a Republican.

Mr. Wirin: He is not an Oriental.

Mr. Flynn: Yes, Governor Stainback is haole, appointed by the President.

Judge Metzger: And a Democrat.

Mr. Wirin: Well, I wouldn't press it.

Mr. Flynn: And a Democrat, yes.

Mr. Wirin: I will go on to something else, if the Court feels it is not material.

Judge Denman: I think you are going way afield.

Q. Do you know generally how long the language schools, referring particularly to the Chinese and Japanese, have been in existence on the Islands? I am referring now to formal language schools.

A. I can't get the exact dates. I know that the first ones were organized back in the nineteenth century. And as far as the Japanese language schools are concerned, that they experienced a considerable boom around 1905.

Q. Can you give us an estimate of the percentage of the population who make up, who are citizens?

[fol. 759] A. Well, again referring to the census figures, I believe those are the only ones available, and it is somewhere, I believe, around 84 or 85 per cent.

Q. Do you have the figures as to the number of children on the Islands who attended parochial schools?

A. Not for all the Islands. On the Island of Oahu.

Mr. Flynn: Well, that already has been in, at least, from the Department of Public Instruction, is already in the record.

Mr. Wirin: Only private schools, not parochial.

A. I believe you are mistaken, Mr. Flynn. The record which I have seen gives only the total of students in the private schools, Grades 1 to 12. There were 14,883 in the private schools, and as nearly as I can determine, some 9,616 were in the parochial schools. The others being non-religious.

Q. Has there been any immigration into the Islands from China or Japan since 1924?

A. Only a very negligent immigration.

Q. What is the fact, if it be a fact, with respect to the speaking by some of the teachers in the schools, general public schools, of pidgin English?

Judge Denman: Is this a renewal of the testimony on your direct?

Mr. Wirin: I don't think it is that. I think it is an effort [fol. 760] to rebut certain evidence which is in the case from the defendants. I am skipping around from one point to another merely to try to fill in certain holes which have not been quite filled in.

(To the witness) Will you answer the question?

A. I will try to. It is a rather difficult question to answer. Most teachers who have been brought up in the Islands speak pidgin. My wife, for example, speaks it rather well. At the same time she does not speak pidgin if she can avoid it. There are a certain number of teachers, I believe—I believe that no teacher consciously speaks pidgin in the class room except to illustrate a point. There are a certain number of teachers whose mastery of standard English is rather weak, and whose standard English is considerably tinged by pidgin. There are a great many teachers who use standard English in those situations which require, in those situations which are required socially, and pidgin in those situations which at least encourage it socially.

Q. Do you ever speak pidgin English during the play period at times?

A. Do the teachers speak them?

Q. Yes?

A. I don't believe that they do. I would say that there are some teachers whose command of the standard English is such that they are unable to notice some deviations from

[fol. 761] it on the part of the student. Now, what proportion of teachers fall in that group, I don't know.

Q. Now, can you tell us briefly about the nature of the drive for "Speak American", or "Speak English", on the Islands during martial law, just very briefly, Doctor?

A. I have here the final report of the Emergency Service Committee which was a Japanese group. It says: "The Speak American campaign was started by the committee on October 12, 1942. It had the support of the Army authorities and of civilian leaders in the Territory. In sponsoring the campaign the committee believed that it would be a positive contribution to the Americanization of the people of Hawaii, and at the same time it would eliminate one source of irritation."

Now, this drive was directed primarily at the elimination of the Japanese speaking in public. However, it was extended. I don't know that it was extended by this committee, but there was a good deal of sentiment for extending it to eliminate pidgin. That is, speaking standard English was to become one of the marks of good Americanism. I don't know to what extent that drive affected the people. I know that about the same time the Department of Public Instruction began to emphasize more the instruction in oral English. And it is my opinion, based on the results at the intermediate school where I was teaching at the time, that it had some result.

[fol. 762] Q. Do you have some information as to what happened to the properties of the Japanese language schools?

Mr. Flynn: I think that is incompetent and immaterial.

Mr. Wirin: Well, it is very brief. I think the materiality will appear. Shall I state it first?

Judge Denman: I think you had better.

Mr. Wirin: I think this witness will testify that the Japanese language schools to a very large degree surrendered their property to either the Government or to public organizations like the USO, and surrendered them permanently. I think your Honor should know that in connection with the consideration of the evil or alleged evil which will be argued. In other words, as far as the Japanese language schools, most of them will never be reopened because they have permanently given away their properties either to the Govern-

ment or to some public organization. I should think you would want to know that.

Judge Denman: You mean to say that you want the Court to understand that the Japanese have abandoned teaching Japanese language in school in the ages indicated by the statute?

Mr. Wirin: I don't want the Court to believe or to understand that all of them have done it, but I want the Court to know if it is a fact, and I think it is a fact, that a number of them have done that.

Mr. Flynn: I will object again, your Honor. I think it [fol. 763] is incompetent, irrelevant and immaterial. I believe that in our answer we stated that many of the schools had disbanded or discontinued.

Judge Denman: Well, if it was relevant at that time, we will allow the question.

Q. What is the fact as to that?

A. I know, as reported by Dr. Lind, all the 22 schools on the island of Kauai disposed of their property. And it is my impression that a large majority of the schools on the other islands did so.

Q. Who is Dr. Lind whom you refer to?

A. Dr. Andrew Lind, the author of "Hawaii's Japanese".

Q. Is he a professor at the University of Hawaii?

A. A professor at the university, and an authority in that field.

Q. Now, do you have an opinion—and if so, what is it—as to the value of acquiring a knowledge of an Oriental language in Hawaii?

Mr. Wirin: I will be very brief. It may be supplemental to the witnesses' former testimony.

Mr. Flynn: I think it is objectionable, your Honor. I don't think it comes in on rebuttal testimony when he testified directly on the same matters before.

Mr. Wirin: I don't think he has on this precise matter, and it is in rebuttal on the testimony of the defendants. [fol. 764] Judge Denman: The testimony in behalf of the defendants is that in determining the value of the education of the child, as shown in the figures, that no attention is given to the gain of the child who has a dual language capacity, if that may be a gain. At any rate, it is not regarded as an element in it. Now, that is the apparent con-

dition of the figures. Now, the relevancy of the figures which omit that kind of consideration raises the question as to whether or not it was worth anything.

Mr. Flynn: Well, my objection is this, your Honor—I am willing to stipulate that a dual language ability is valuable in Hawaii and everywhere else. Our law isn't intended to eliminate dual language ability. It is to regulate the acquisition of it.

Mr. Wirin: Will you stipulate that it is particularly valuable in Hawaii because of the large number of Orientals?

Mr. Flynn: Yes, I will stipulate that it is of particular value here.

Mr. Wirin: And if it is of particular value in connection with business because it is desirable and advantageous to a person here, say of the Chinese language, to be able to converse and to write to persons of Chinese descent in the Chinese language in order to do business?

Mr. Flynn: Yes, I will stipulate to that.

Judge Denman: It has already been testified to be of value in the relationship of parent and child, so that you now [fol. 765] have your area covered of the home, of business, and I presume it has been stipulated in the development of a human being. The wider the range of his wisdom of the world, the better it is for him.

Mr. Flynn: That's right.

Judge Denman: And the foreign language contributes to that as a value?

Mr. Flynn: Yes.

Mr. Wirin: One further stipulation in connection with the proficiency of the business of languages, that a knowledge of the Oriental language is particularly needed to persons in the professions like lawyers, doctors and dentists, and their clientele might consist of persons very largely of the same race as their own.

Mr. Flynn: I will stipulate to that for what it is worth.

Judge Denman: Any stipulation regarding the value of pidgin?

Mr. Flynn: Well, we can all get by with it, your Honor.

Mr. Wirin: Now, I think I have one or two more questions.

Q. You have heard Dr. Smith's testimony with respect to the effect of bilingualism in various places. What is the status of expert opinion in the field? Is it uniform or [fol. 766] not? And please explain your answer.

A. So far as I know, it is not uniform. If I may refer to a study which was made, which was printed in 1937, called "Bilingualism and Mental Development", a study of the intelligence and the social background of bilingual children in New York City, this is one of the Teachers' College, Columbia University's contribution to education, No. 712. The author is Seth Arsemian. Dr. Arsemian surveyed not all the literature, but a large part of it. He found a considerable difference of opinion among the authorities and says furthermore, "This review of previous work in the field indicates clearly that the scientific study of bilingualism is merely at its beginning". This is largely because of the varying methods adopted by the investigators. And he further pointed out a number of factors which should be taken into consideration, and controls which should be adopted. He made a study which is reported here, and the result of his own particular study was that on the basis of the evidence of this research it is concluded that bilingualism does not influence favorably or unfavorably the mental development of bilingual children, children of ages nine through fourteen in the various groups studied.

Q. What is the name of the book which you have been referring to?

A. It is "Bilingualism and Mental Development".

Q. Now, Dr. Reinecke, have you given some consideration [fol. 767] in an answer to an inquiry by Judge Denman as to what might be possible scientific test or tests to determine whether or not there is emotional instability in connection with either bilingualism on the one hand or the study of a foreign language concurrently with domestic language on the other hand?

A. I have given that some thought. It must be remembered that I speak entirely as a layman in the field of psychology. But it seems to me that any study of emotional effects of any type of activity would have to be subject to certain controls. That is, you would have to isolate the effect of attendance at language school or the effect of speaking two languages from the effect of other conditions under which, in which the person found himself.

Q. Do you want to give an example of some of those others, some of those other conditions that might cause emotional stress?

A. Well, I will refer to one of the studies which was reported by this author, that is, of a man named Henss,

who reported the case of his own son who grew up in Holland. He used both of his hands equally well up to the fourth year when he was sent to a German school. His language development in Germany was rapid. At this time he started a preference for the use of his right hand. In the following eight weeks vacation, however, when he practiced the Dutch language in his play with Dutch children, he discontinued his preference for the right hand. On enter- [fol. 768] ing the German school again he changed to the right hand. During this period he spoke an equal amount of German and Dutch and began to stutter. This continued until he left Holland and forgot the Dutch language. I should think that in a case like that one would have to consider not only the difficulties the boy might run into in changing from Dutch to German and back again, but the difficulties that he would run into in adapting himself to the customs of his playmates. And in moving from one home to another.

Mr. Wirin: That concludes my examination.

Mr. Flynn: I would like to ask a couple of questions.

Cross-examination.

By Mr. Flynn:

Q. And this study of bilingualism and mental development that you referred to, Dr. Reinecke, does that deal in any way with persons who are pursuing the formal study of two languages at the same time, or does it refer only to people by reason of their background, bilingual?

A. It refers to both, with as near as I can tell, a considerable majority of the cases being of bilingualism only. However, there are some cases which refer to attendance—pardon me—which refer to the formal study of two languages at the same time.

Q. Did any of that deal with such study by children in the first grade in school?

A. Some of them dealt with children in the lower grades.

Q. Only the lower grades?

A. Yes. You asked if it dealt with the first grade.

[fol. 769] Q. By the lower grades, do you include the first grade?

A. I do.

Q. But you stated that the ages covered were ages nine through fourteen, is that correct?

A. This is Arsemian's own study on the Italian and Yiddish-speaking children in New York City.

Q. Ages nine through fourteen?

A. Nine through fourteen.

Q. Which in almost every instance would take children from either third or fourth grade and up, would it not?

A. That would be true. And he has nothing, so far as I know, on their attendance at Italian or Yiddish language schools or Hebrew language schools either.

Q. Merely the matter of their being bilingual children?

A. Yes.

Q. Now, you have previously referred to this study by Dr. Symonds?

A. Yes.

Q. At my request did you examine that to see what age groups or grade groups were covered?

A. Yes, I did.

Q. And what grades or ages, or age groups, were covered?

A. Fifth to eighth, as I remember.

Q. Fifth to eighth grades?

[fol. 770] A. Yes.

Q. Now, one brief question, Dr. Reinecke. These statistics for 1936 on the schools, what is the source of your statistics that had the percentages you stated, 80 some per cent attending Japanese schools?

A. Eventually from the records made by the Department of Public Instruction. These were cited in a book. I haven't the title at hand, a book on schools in the territories and possessions of the United States.

Q. And the estimate there was 35 per cent of Chinese pupils in the public schools are likewise attending language schools?

A. It doesn't say that exactly. It says that the number of students attending the language schools is such and such a number, and taking the number who are attending the English language schools and assuming that the vast majority of those in the foreign language schools are enrolled in English language schools, I arrived at that percentage.

Q. Did your figures cover this possibility, that the total number of students of Chinese ancestry in the public schools would run from one through twelfth grade?

A. Yes, that is understood.

Q. And similarly, as to the students in the Chinese language schools from one through twelfth grade in language schools?

[fol. 771] A. I don't believe that many of the people in the Chinese language schools would be in a higher grade, but what I meant is that the pupils enrolled in the Chinese language schools were almost all of them in either private or public schools. That is, most of them would fall within the years, the range of compulsory attendance.

Q. Well, what I have in mind is this, your figure of 35 per cent is on the total number of students in Chinese language schools, and the total number of children of Chinese descent in the public schools?

A. Public plus private.

Q. And private schools? All the other schools?

A. Yes.

Q. Your figure of 35 per cent is presumably accurate for that total percentage?

A. Yes.

Q. But would that be accurate concerning only children in the elementary grades?

A. It probably would run somewhat higher.

Q. Somewhat higher?

A. In the elementary.

Q. Would you have an estimate as to the percentage in, say, the first six grades?

A. No, I would not have. That could be obtained, I think, from the report submitted to the Department of Public [fol. 772] Instruction during the time—Let's see—1921 to '27, I believe.

Q. So reports were submitted even on through until 1940, but those particular statistical data had not been compiled, but you do estimate there would be a somewhat higher percentage?

A. Yes.

Q. Considering only the grade school children?

A. Yes.

Q. Would you estimate that would run as high as 50 per cent?

A. I couldn't say how.

Mr. Flynn: No further questions.

Mr. Wirin: No questions.

Judge Metzger: This word "pidgin", where did that come from, if you know? From what was it derived?

The Witness: Well, the word itself started at the port of Kwantung as far back as the 1700's, when the dialect of English grew up between the foreign seamen and the Chinese merchants, and it has been extended to cover rather broken-down languages all over the world, not only English.

Mr. Wirin: That's all of this witness. Now, your Honor, that concludes our testimony.

(Witness excused.)

Mr. Wirin: There is one other matter to attend to, as far [fol. 773] as evidence is concerned. We have arranged to have photostated in at least triplicate portions of the '35 and '37 and '46 hearings, which will be available tomorrow morning, and we will then offer into evidence the photostatic copies of pages of those hearings, and that will conclude our case. There will be no other evidence.

Judge Denman: That will cover all these photostatic copies? I suppose four of them, the original and three copies for the judges, or how will that be done?

Mr. Wirin: We thought an original and two copies for the judges, but maybe we could have another one. That's all that we could arrange for, your Honor.

Judge Denman: Well, that will coven all the material, the photostat- will cover all the material that is not in the transcript by the stenographer?

Mr. Wirin: Except for certain other exhibits which will be filed in triplicate, like typewritten exhibits, so that every exhibit will be in triplicate.

Judge Denman: I imagine that if there is nothing further to do this afternoon, to commence the argument of the case. How long will it take you to present your opening?

Mr. Wirin: I had contemplated either waiving opening or making a very short statement, for I have stated my position pretty much at the outset of the case in the opening statement. My guess is that an hour, or a little over an [fol. 774] hour on each side might be adequate. I would assume that if we convene at nine, by noon we ought to be through.

Mr. Flynn: That is my estimate too, your honor.

Judge Denman: Tomorrow morning at nine o'clock.

(The Court recessed at 4:27 P.M.)

[fol. 775] Honolulu, T. H., July 1, 1947.

(The Court convened at 9:00 A.M.)

The Clerk: Civil No. 765, No Hock Ke Lok Po and others vs. Ingram M. Stainback and others, for further trial.)

Judge Denman: Proceed.

Mr. Wirin: If the Court please, before the oral argument commences, there are two matters of evidence, one is, we have an additional short stipulation in connection with some figures which I'd like to call the attention of the Court to. That as of December 31, 1940, with respect to formal language schools, there were in the Islands language schools as follows: 165 Japanese, 8 Chinese, 5 Korean. Our further information is that Korean schools closed some time towards the end of 1940 or early 1941 and closed prior to and in connection with the declaration of martial law.

Judge Denman: Is that stipulated to?

Mr. Flynn: The first part as to the schools is, if your Honor please. I only ask counsel to repeat the latter data.

Mr. Wirin: Our information is that the Korean schools closed the latter part of 1940 or early part of 1941, and that they closed prior to the declaration of martial law.

Mr. Flynn: I believe that is correct.

[fol. 776] Mr. Wirin: And not in connection with or because of any order of martial law.

Mr. Flynn: That is correct.

Mr. Wirin: There is one other matter, and we are arranging to have photostats made of certain pages of various statehood hearings. They are not here this morning, though we expected they would be. We are entirely ready to proceed with the oral argument if we can have an understanding, and I understand counsel is agreeable, that we may offer these during recess. They are in effect merely duplicates of what is already in evidence by way of identification. Is that agreeable?

Mr. Flynn: That is agreeable. I even suggest that we be permitted to offer them to the Clerk of the Court, say as of tomorrow, in the event there is further delay in the accomplishing of it.

Mr. Wirin: Well, they may be here and we will want to make some reference in our argument.

Mr. Flynn: We may add a photostat or two, and we'd like to have until tomorrow to submit those for the record.

Judge Denman: You may have an order that they may be filed with the Clerk.

Mr. Wirin: With respect to the oral argument, Mr. Char will open for the plaintiffs, as there will be two on our side, and we understand the argument for the defendants will be by Miss Lewis.

[fol. 777] Mr. Flynn: I would like to advise the Court that Miss Lewis will take part in the argument with me.

(Mr. Char summed up for the plaintiffs.)

(Mr. Flynn summed up for the defendants.)

(Miss Lewis summed up for the defendants.)

(The Court recessed at 11:55 A. M.

Afternoon Session

Judge Denman: You may proceed.

Mr. Wirin: May it please the Court, I wonder if with the permission of the Court I may interrupt my argument? I now offer the photostats which have been made and which will dispose of the case so far as the plaintiffs are concerned. These are photostats primarily of the statehood hearings. [fol. 778] Would that be in order now? I intended in my opening argument to make some reference——

Judge Denman: The originals are in evidence.

Mr. Wirin: We intended to withdraw the originals, which had been marked for identification, and offer photostats of certain pages. I understand that is agreeable.

Mr. Flynn: That is agreeable with us, and it is understood that we will file some tomorrow with the Clerk and it will be served upon the Court.

Mr. Wirin: I want to offer next in order a group of photostatic sheets which are clipped together, entitled "Statehood for Hawaii, Hearings before Subcommittee of the Committee on the Territories on House Resolution 236," being offered in triplicate.

Judge Denman: What is the number?

The Clerk: The exhibit number?

Judge Denman: Yes.

The Clerk: Plaintiffs' Exhibit E.

(The document referred to was received in evidence as Plaintiffs' Exhibit E.)

Mr. Wirin: And next in order I want to offer photostat of document entitled, "Statehood for Hawaii, Hearings

Before the Joint Committee on Hawaii, Senate Concurring Resolution 18."

[fol. 779] The Clerk: That will be Plaintiffs' Exhibit F.

(The document referred to was received in evidence as Plaintiffs' Exhibit F.)

Mr. Wirin: And next in order, a photostat of two sheets from a book by Professor Lind. The photostats, however, purport to be photostatic copies of a quotation from "Statehood for Hawaii Hearings before the Subcommittee of the Committee on Territories," published in 1936. I understand there is no objection from Mr. Flynn.

Mr. Flynn: No objection.

The Clerk: This latter one is marked Plaintiffs' Exhibit G.

Judge Denman: It will be admitted.

(The document referred to was received in evidence as Plaintiffs' Exhibit G.)

Mr. Wirin: The last one, photostats of certain pages from a publication, "Statehood for Hawaii Hearings on HR-3034."

The Clerk: That will be Plaintiffs' Exhibit H.

(The document referred to was received in evidence as Plaintiff's Exhibit H.)

Mr. Flynn: To clarify the record on one possible error, your Honor, the reports of the legislative committees are [fol. 780] attached to our answer to the amended complaint. It is stipulated by counsel that they may be regarded as received in evidence by the Court.

Judge Denman: So ordered.

Mr. Wirin: I think the Court can take judicial notice of them anyway. We have no objection.

One other matter in connection with the evidence. May it be understood that the plaintiffs will draw various documents which have been merely marked for identification, that the plaintiffs will withdraw those documents, so that the Court will not have, or any of the judges will not have the text of the hearings, but would merely have photostatic copies which we have furnished, and which I understand counsel may also furnish.

Judge Denman: So ordered. You don't want any private exploration of these documents?

Mr. Wirin: We don't want to burden the Court. They are public records and we couldn't stop it.

Judge Denman: I know that you don't want to burden the Court with the repetition of testimony of one of your witnesses. May I ask you, are you offering any authorities not in your original memorandum?

Mr. Wirin: I think not.

Judge Denman: Then we would like to have a reply memorandum from your opponents.

[fol. 781] Mr. Flynn: We have contemplated asking the Court for permission to file one. It could be done in a few days. We could file a reply with the Court, a reply memorandum in triplicate, and furnish it to counsel.

Judge Denman: Five days would be enough?

Mr. Flynn: That would be Monday. Yes, yes, your Honor.

Judge Denman: I was thinking of it reaching us for our contemplation by air mail.

Mr. Flynn: On your arrival I think it should definitely be there.

Mr. Wirin: I understand that the memorandum will cover the cases discussed here.

Mr. Flynn: Yes.

Mr. Wirin: So the judges will know what the positions of the defendants are.

(Mr. Wirin summed up for the plaintiffs.)

Judge Denman: The case stands submitted.

(The Court adjourned at 3:10 o'clock P. M.)

[fol. 782] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 783] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Civil No. 765

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, Chung Shan Chinese School Association, An Eleemosynary Corporation, Wah Chan Thom, Wilfred Chong, and Leong Nget Cho, Plaintiffs,

vs.

INGRAM M. STAINBACK, NILS C. TAVARES, and W. H. LOPER, Defendants

Transcript of Proceedings—Filed May 14, 1948

In the above-entitled matter, held in the U. S. District Court, Honolulu, T. H., on February 26, 1947,

Before Hon. Delbert E. Metzger, Judge

APPEARANCES:

Nicholas W. Y. Char, Esq., appearing for Plaintiffs;
Thomas W. Flynn, Esq., Assistant Attorney General; Appearing for Defendants.

[fol. 784] PROCEEDINGS

The Clerk: Civil No. 765, Mo. Hock Ke Lok Po, an elemosynary corporation, and others, versus Ingram M. Stainback, Nils C. Tavares and W. H. Loper, for further hearing on the matter of jurisdiction.

The Court: Well, since the last hearing, which was on motions to dismiss and on defenses in law, there has been filed a motion to strike from the answer, a supplemental pleading and a motion to strike the Plaintiff's supplemental pleading. So we are piling up the record higher and higher. As I recollect, at the last hearing the Plaintiff was given an opportunity at this hearing to prove jurisdiction, and it was thought best that the matter of jurisdiction be more specifically covered in a supplement to the pleadings. Now, a supplement to the pleading has been filed and there is a motion to strike it.

Mr. Flynn: Yes, sir.

The Court: It would seem proper to me to hear first the motion to strike this supplemental pleading.

Mr. Flynn: Yes, I agree, your Honor. I was thinking we might possibly save some time and work towards the convenience of the Court if we combine the arguments that will follow, Plaintiff's proof on this issue, with the statements as set forth in the motion to strike. Technically I think it might be more accurate to argue on the motion to [fol. 785] strike, and I will do so now.

The Court: All right.

ARGUMENT ON MOTION TO STRIKE SUPPLEMENTAL PLEADING

Mr. Flynn: Our motion, your Honor, states as a proposition that the Plaintiff's supplemental pleading is vague and uncertain and that the supplemental pleading contains conclusions which do not follow in any logical way from the allegations set forth in the supplemental pleading. And specifically the pleadings placed great emphasis, the supplemental pleadings, placed great emphasis on the matter of the number of pupils in the first four grades of the language school, the amount of income derived from them. That is one major premise.

The other is that the teachers in the high school grades of the language schools would not be able to qualify in the requirements of the law calling for a knowledge of English as well as the foreign language.

And as to the first premise, the law on its face doesn't close the first four grades of the language schools. It simply requires that the pupils who start in the language schools be past the fourth grade of their regular public or private schools. And it could readily follow that there would be a number of pupils available in the upper grades of the elementary schools, public and private schools in the Territory, who would start in the first grade of the language school.

[fol. 786] The Court: Well, it would strike out every child under six years old, would it not?

Mr. Flynn: Every child under nine years old, unless the child had passed——

The Court: No, I mean it would prohibit under any other circumstances every child under six, wouldn't it?

Mr. Flynn: From going to school?

The Court: Yes.

Mr. Flynn: Yes, your Honor. In other words, the kindergarten.

The Court: The pleadings said that the schools were organized to accept children from the age of five years upward.

Mr. Flynn: Up to twenty years, your Honor.

The Court: So that all who are between five and six would be definitely prohibited?

Mr. Flynn: Yes, your Honor.

The Court: Go ahead.

Mr. Flynn: But my statement is that it doesn't follow from that that the schools would necessarily lose any income. Now, going to the next point, the Plaintiff's own pleadings show, and the Court could even take judicial notice, that there has been no language school instruction for at least five years, since December 7, 1941, from which it follows on the face of the law that there would be a large number of pupils, pupil students, in the age above the fourth grade in regular schools who would have to start [fol. 787] in the first year of language school, no matter what time they would begin, or at any age from which it could be reasonably followed that there is a large number of pupils available for first grade instruction, as there had been before the war, before the Act was passed.

The pleadings of the Plaintiff contain definite statements or language to the effect that the first four grades are absolutely closed out. From the reading of the law, it shows that not to be the case.

Then as to the second point of the schools not being able to obtain qualified teachers, or rather basing that on the proposition that the teachers in the high school grades of the language schools would not be able to pass the English language test required by the law, contains no showing that there are no other teachers available who could pass the tests. And that allegation, I submit, is therefore insufficient. And to back up the conclusion that they tried to reach, they tried to reach the conclusion that the high schools would be likewise eliminated from their course of instruction. Bearing in mind that our present point is involved only with the matter of money and not with any other difficulties or inconveniences, that the law might appear too bold, I will submit the motion on those points, your Honor.

ORDER DENYING MOTION TO STRIKE SUPPLEMENTAL PLEADING

The Court: The motion to strike Plaintiff's supplemental [fol. 788] pleadings is denied.

Mr. Flynn: May we have an exception?

The Court: Yes. We will now hear the Plaintiff on the substance of his supplemental pleading.

Mr. Char: The substance?

The Court: Yes, the substance that goes to jurisdiction.

Mr. Char: If your Honor please, we propose to produce evidence, that from five years old up, that is, the statute reads that the child must pass the fourth grade in the public schools and that runs up to nine or ten years. That means an elimination of all students from five years old up to ten years old, inclusive. Now, you take the Mun Lun School. The Mun Lun School had prior to December 7, before its closing, had 1,100 students, about 1,100 students, and it had in the primary, in the lower grades, about 300 students. And they were charging $1.25 a student. Those 300 students would be eliminated.

The Court: What age did you say?

Mr. Char: From five to nine or ten.

The Court: You haven't got any figures from five to six?

Mr. Char: We have, if your Honor please, but I have the annual year book. Most of the books have been destroyed when the army occupied the schools right after December 7. Most of these books were destroyed but I have before me, if your Honor please, the Annual Year Book of 1940 of the Mun Lun School, and I will take the [fol. 789] kindergarten. It had 18 students.

The Court: In what school?

Mr. Char: The Mun Lun School. Then they had the first grade, 27 and 42. Twenty-seven in the first grade and another one, B, that is 42. Then we have the second grade, two classes, 37 and 44. This is in the year 1940, if your Honor please. Then in the third grade there were three classes, 36, 37 and 37. And in the fourth grade two classes, 31 and 35. That makes a total of 344 students. And in the Mun Lun School they were obtaining $1.25 per student, and they operated twelve months of the year. There was a fee of $5,160.00 per annum in the year 1940. The statute says that they must pass the fifth grade before they can enter the Chinese schools. This is per annum. And that will take place, if your Honor please, for four years, four years from the time it starts, and it will run to $20,000.00.

The Court: What is this four years that you keep talking about?

Mr. Char: Well, if your Honor please, there you have the first, second, third and fourth grades. Say that we opened the schools and had 300 students. The 300 students will be in the first grade because during the war they did not operate. They will then have to go to the first grade of the Chinese school. Then the next year there will be 300 students or 344 students in one class in the first grade. Say [fol. 790] that we open, and next year these 300 students will go to the second grade and third grade and continue for four years because that is the elimination of four years. Then we come to the fifth grade. When you come to the fifth grade then the statute says you have only to pass the English standard test.

The Court: Let me see again, how does that statute read there?

Mr. Char: "Requirements for pupils. No child shall be taught a foreign language in any school unless he shall comply with one of the following requirements: that he shall have passed the fourth grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the Department of Public Instruction attaining a score not lower than normal for his grade."

The Court: Well, does that mean and does the statute throughout mean that all children under the fourth grade in public schools are prohibited from going to foreign language school?

Mr. Char: That's right, under the fifth grade they are prohibited.

The Court: All right, I get your four years. Go ahead.

Mr. Char: Now, take the fifth grade students. They go to the Chinese school, fifth, sixth, seventh, eighth grade. The fifth grade will then go to the first grade. I am talking [fol. 791] now if they were opened up. That is, all these young students, all these young boys and girls up to the fifth grade will have to attend the first grade. And also those who were in the fifth grade will have to attend the first grade. And I say, if your Honor please, that the fifth grade students, when they come to studying in the first grade, they are ashamed to go to school. We wouldn't get

the number. They would form a habit and it will become natural to them.

And, if your Honor please, if the young child of five, six or seven years old has a few subjects in the public schools, and very few hours, when they go to the Chinese school and learn to speak or sing, or just speak, the spoken language, they grow up that way by learning to talk first. Whereas the fifth grader comes down there and he is not apt to pick up the language, to learn it by ear.

Now, you take the sixth grade student that comes down and studies in the first grade. That involves a ten year old child or eleven years old, and they come down and study in the first grade in Chinese school, and most of them will feel ashamed to study, ashamed to come down to that lower class and learn childish things.

Then we go up to the college. Normally the high school student in a public school will go to high school in the language school. But under this present law, the college student will have to go to the freshman class in high school be- [fol. 792] cause there is a four years approximately of difference. You see, the fifth grade will go to the first grade. The sixth grade will go to the second grade in language school. Take the high school, they will be going to the fifth, sixth, seventh and eighth. Then this very student will go to college. He will be a freshman in high school in the language school.

The Court: When you speak of college, do you mean——

Mr. Char: The English college.

The Court: ——regular college, university?

Mr. Char: That's right, your Honor.

The Court: Or do you mean a preparatory, academic college?

Mr. Char: No, university. I should have referred to the university.

The Court: They call Punahou a college. It is merely an academic school.

Mr. Char: They call the public high school academic. So when I am referring to those students following in compliance with the statute, if they were entering freshman in a university, they were studying the course in the language school as freshmen in high school or in academic schools. And, your Honor well knows that the people who go to col-

lege, they have no further interest in a foreign language in high school. The curriculum is so heavy that they are unable to continue with it. It practically eliminates the high school of the language school. There wouldn't be any students. There wouldn't be any students to attend the high [fol. 793] school in a language school.

Now, as to the selection of teachers, if your Honor please, the selection of teachers isn't just picking them up at random from the local graduates. The teachers in a high school and language school are mostly qualified teachers from China. They know the language thoroughly. The lower grade teachers are obtained from the graduates from this school and they just graduate from high school. That is, an academic high school. They would not be able to qualify as teachers to teach language schools in high schools. And those teachers have to be obtained from China. And the teachers that come from China could not speak the English language, could not qualify under the statute that the Chinese teacher has to pass an English test. That is the requirement for teaching, that

"No school shall permit the teaching of any foreign language to any child under the age of 15 unless the teacher shall have been examined and certified by a Board of Examiners of three persons appointed by the Commissioners of public instruction to be reasonably well-versed in the usage and idiom of both the English language and the foreign language to be taught by such teachers. The Commissioners of public instruction shall appoint one or more of such boards of examiners as may be necessary."

And it goes on, your Honor please. It says, "reasonably well-versed in the idiom of the English language." Now, [fol. 794] the attendance in the high school, say that it runs to a hundred students. The Mun Lun tuition is $1.75 per student per month. The Chung Shan School is $2.00. Say that there are a hundred students in a high school and that runs up to $200.00 per month, or per annum it is about $2,400.00, at $2.00 per month.

Now, that practically eliminates the foreign language high schools because they can't get the qualified teachers and they can't get the students. I don't mean to say for four years, but permanently.

And then, if your Honor please, it involves the donations. The operation of these schools requires donations from the

parents and from the outside public annually. And there would be a drop in attendance.

The Court: What would be the donations to these various schools, these three schools? What do they run, about?

Mr. Char: They average about $5,000.00 a year.

The Court: For the three of them?

Mr. Char: For the three of them. $3,000.00, $4,000.00, and the Dai Kung School about $500.00.

The Court: Are you prepared to give proof of that?

Mr. Char: Yes, your Honor. In the books they mention the donations. In other words, these books were prepared before this trial ever was thought of. It was 1940. And this other one was 1936.

The Court: Well, are the books in English?

[fol. 795] Mr. Char: No, in Chinese. Some parts are in English.

The Court: Who prepared the books?

Mr. Char: The school authorities. The school authorities, I think, if your Honor please.

The Court: Are you able to lay the groundwork for putting it in evidence?

Mr. Char: Yes, your Honor.

The Court: The book makes that showing?

Mr. Char: Yes.

The Court: Well, I think this would be a good time to begin on your proof, documentary or testimonial evidence, and to these various things you have set up here to show jurisdiction in the Court.

Mr. Char: I have some witnesses here, if your Honor please, but I didn't expect to put them on. I thought there was going to be some argument. I don't have all of my witnesses here, but I have four witnesses here.

The Court: Well, after hearing the defense arguments on the motion to strike the supplemental pleadings with relation to jurisdiction and amounts, I am convinced that it should not be struck. I am convinced that it should not be struck until you have put in proof on your allegation. And I think this is a good time for you to go ahead with your proof.

Mr. Char: We need an interpreter, if your Honor please.

The Court: Well, I don't know——

[fol. 796] Mr. Char: We will try to get along as best as we can, with broken English.

The Court: Well, all right. I don't understand the

Chinese language, but I understand more or less our so-called pidgin English, with a few Hawaiian words thrown in here and there.

Mr. Char: It is rather difficult. He wants an interpreter. If he doesn't understand, we could check the translation. I am a product of the Chinese school, too, if your Honor please.

The Court: You are a product of what?

Mr. Char: I am a product of the Chinese school.

KONG CHIN YOUNG, a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Char:

Q. What is your name?

A. Kong, Chin Young, Y-o-u-n-g.

Q. How old are you?

A. Fifty.

Q. Are you an American Citizen?

A. Yes.

Q. The Chung Shan School, were you a Principal of that school, or a teacher?

A. Principal.

Q. Now, what years were you Principal of the Chung Shan School.

[fol. 797] A. 1932 until 1941, the war time.

Q. 1932 to 1941?

A. December 7.

Q. Up to December 7, 1941? Prior to 1932, were you a teacher prior to 1932?

A. Yes, a teacher in 1931 in the Chung High School, 1930 Hoo Jo.

Q. Speak a little louder.

A. 1930, Principal of Hoo Jo School on Liliha Street.

Q. How many years have you been teaching school prior to 1931? When did you start teaching school?

A. 1917.

Q. 1917? Did you graduate from any schools?

A. From teacher college in China, one year I go——

Q. One year?

A. More. The third year. I in teacher college in three years, four years I graduate, just like in university in teacher college.

Q. How many years you study in China?

A. Oh, I forget how long, more than ten years.

Q. In China? And you finished Teacher's College in China?

A. One year I don't finish.

Q. Except one year? What is the name of the Teacher's College?

[fol. 798] A. The National Teacher College of China.

Q. Where?

A. Canton.

Q. And you have been teaching from 1917 up to 1941, is that right?

A. No. From 1922 and 30 I never teach. I go business in Honolulu.

Q. From 1922 to 1930, those eight years, you did not teach?

A. No.

Q. You were in business?

A. Yes.

Q. Now, I hand you this book of Chung Shan School. Tell the Judge what it is.

A. This is the annual of Chung High School.

Q. For what year?

A. 1937.

Q. 1937? Did you have an annual for 1938?

A. No.

Q. Did you have an annual book like this for 1939 or 40?

A. No.

Q. Just 1937?

A. Yes.

Q. Well, why did you have it in that year, 1937?

A. This kind of printing is high now.

[fol. 799] Q. Printing in China?

A. And in 1937 printing—war with Japan.

Q. So no more book was printed?

A. Printing here cost so much.

Q. Who gather up the material in this book?

A. From our school faculty.

Q. Did you help?

A. Yes.

Q. Did you help in getting up the material in that school?

A. Yes.

Q. Now, your picture appears in that annual?

A. Yes, this is my picture.

Q. On page 65 of this annual——

Mr. Char: His picture appears, his photograph appears on page 65 of this annual.

The Court: Yes.

Q. Now, in this book, does it say where it was printed, published.

A. Commercial Press in China.

Q. On what page is that?

A. There (indicating).

Q. It is not there——

Mr. Char: On the last page of the back cover the English word "Printed by the Commercial Press, Ltd., Shanghai, China." And, on the bottom of the front cover Chung Shan Annual, 1937, in English:

[fol. 800] The Court: Yes.

Q. How many teachers did you have in that year?

A. More than 20.

Q. And in 1941, at the time of its closing, how many teachers did you have?

A. About 20. It is more than 20. Some teacher not take charge of the whole class, maybe teach a course, two, three teachers teach in high school.

Q. What you were counting there were 18 classes?

A. More than that. They are joined together in the picture.

The Court: The book shows the picture of 18 separate classes?

Mr. Char: Yes, your Honor.

The Court: And a teacher presiding over each class?

Mr. Char: Yes, sir.

The Court: And then, what does he say about other additional teachers?

Q. That is, in high school additional teachers, in high school, they have two or three teachers?

A. Yes.

Mr. Char: In one class in high school, two or three teachers.

The Court: Oh, yes.

[fol. 801] Q. Now, in the year 1937 you have pictures of the students of various classes?

A. First class, second class, second class B. This is the first class (indicating).

Q. First class on page 141?

A. First class.

Q. How many students in the first class? You counted in the first class 53 students. Is that your memorandum? (Showing a piece of paper to the witness).

A. I think I count 54. This says 53.

Q. You count now 54 but before you count 53 students, is that right?

A. Yes.

Q. And you say on the same page is class No. 2?

A. Class 2-B.

Q. Second grade?

A. Yes.

Q. And how many students?

Mr. Char: I have prepared a memorandum, if your Honor please, that will save time, subject to check.

The Court: I think your memorandum there will be all right. I don't want to spend too much time on that.

Q. That is, 2-A is 55 students, 2-B is 31 students, 3-A is 46 students, 3-B is 35 students, 3-C is 42 students, 4-A is 42 students, and 4-B is 53 students, making a total of 357 [fol. 802] students in those four grades from the first grade to the fourth grade, inclusive, is that right?

A. Yes.

Q. Now, how much you charge each student?

Mr. Flynn: Your Honor, I am willing to stipulate to those facts that are in the supplemental pleading. At least, we take no objection to them. Those are mere matters of arithmetic as to the number of people.

The Court: All right. That disposes of that, then. The defendant stipulates as to the number of students as set out.

Mr. Flynn: I stipulate to the number of students and to the total monies received as set out there for the students and the number of the first grades. Those things I have no argument with, your Honor.

The Court: All right. Now, let's get down to the matter of the donations.

Q. You got any donations here?
A. Yes.

Mr. Flynn: I am willing to stipulate as to the donations, that it is $4,000.00 or $5,000.00, whatever it is. I don't object to that.

The Court: All right, pass that. Now, you allege here some other matters, that the effects of the enforcement of the Foreign Language School Act will result in such a decimation of students as to cause reductions in income greatly in excess of $3,000.00, but jeopardizing the schools, [fol. 803] etc. Are you prepared to present any proof as to that?

Mr. Char: Yes, if your Honor please. I am trying to show again—that is, I will ask this witness.

The Court: Then there is another paragraph here, that parents are afraid to send their children to the school under the effects of this statutory law. Have you got proof of that?

Mr. Char: I will ask this witness. He is the Principal.

Q. Now, Mr. Young, from the fifth grade, from the first grade to the fifth grade, you charge $1.25, is that right?
A. Yes.
Q. And then from the sixth grade to what grade——
A. $1.50.
Q. Sixth grade to what grade?
A. To the eighth grade.
Q. And from the ninth grade up?
A. $2.00.

Q. Now, the effects of this law from the fifth grade up to the eighth grade, you think students will go to the first grade or second grade of your school?

The Court: I think from the question you ask, in the manner you asked it, that he will have difficulty in understanding what you mean. As I take it, what you mean is this, that with this law in effect, that is on the books, and with no pupils in attendance or very few students under the [fol. 804] fifth grade, public school students who would start in the elementary grade——

Mr. Char: That's right, your Honor.

The Court: How would that affect the school? Is that the question?

Mr. Char: Yes, your Honor.

The Court: Well, does the witness know what you are trying to get at?

Mr. Char: Yes, your Honor. I think so. I have spoken to him about it.

The Court: All right. Ask the question.

Q. You understand that?

A. It is not much clear.

Q. Now, you take students in the fifth grade in a public school.

A. Yes.

Q. Do you think they want to come to your school and start in with the first grade?

A. Not much good. They are hard to start.

Q. You tell the judge why.

A. Because they are nine-year old and ten years old, boys, he learn Chinese not as six, seven and eight years old. He learn to hear and speak. Learn the Chinese, not another kind of language. First time he learn Chinese just like sing-song, not much trouble for the boys. First time Chinese understand what the teacher say and must speak [fol. 805] Chinese first. Then they learn Chinese more easily. If you know nothing over ten and nine years old, the children don't know how to hear and don't know how to speak Chinese. How can he learn the Chinese? The first three years the Chinese must be, he understand what the teacher say. Afterward, nine, ten years, then he learn the Chinese more easily, because Chinese in Hawaii, seven, eight years, he don't know Chinese nothing.

Q. You mean young Chinese in Hawaii cannot understand or speak the Chinese language?

A. Yes.

Q. When they come to your school for the first time?

A. Yes.

Q. You teach them just to listen first?

A. Yes.

Q. The teacher just sings to them or speaks to them and they listen, is that right?

A. That's right.

Q. And they copy? Do they copy the first year?

A. Yes, copy in writing and sing.

Q. And sing?

A. Yes. And they talk with stories. The children understand the Chinese first.

Q. In other words, to drill them, to drill their ears to understand?

[fol. 806] A. Yes.

Q. The Chinese language?

A. Yes.

Q. And that will take how many years.

A. About two, three years. He understand what that mean, what the Chinese teacher is talking about.

Q. They point to certain objects and say, this is table, is that right?

A. Yes.

Q. The first two years?

A. Yes.

Q. After that then what?

A. Then they learn the Chinese.

Q. You mean spoken Chinese?

A. No, no, the book, from the writing.

Q. Write from the book? Now, you think that the fifth graders like ten years old or eleven years old come to the first grade?

A. Can hardly learn Chinese.

Q. Why? You explain that to the judge.

A. Because the children, the age is too high. Hard to learn the Chinese. And the children, the old children, they come down to first grade—he is ashamed to learn because there are small children. Any kind of language he speaks—[fol. 807] that is more easy to learn the Chinese when small. And in the English school, plenty home work to do.

Q. And?

A. And can't study Chinese. The first, second, and third and fourth grade in the English school if no more home-work, nothing to do, then he learn the Chinese more easy.

The Court: He means, I take it, that the children of such years that go to the first, second, third and fourth grades of the public school, those children of those years have little or nothing to do at home?

Mr. Char: That's right, no home work.

The Court: That after they get to the age where they attend the higher grades in the public schools, from the fourth on up, that they are old enough so that they have the burden of some chores and other work at home.

Mr. Char: That's right, your Honor. They have home work from the schools.

The Court: And in these higher grades in the public schools, they have to take work home, school work home with them and work that out?

Mr. Char: That's right.

The Court: But not in the lower grades.

Mr. Char: Yes, your Honor. So that it is easier for them than a young child.

Q. So you think from the fifth grade up to the eighth grade, you think there is going to be less students come to [fol. 808] your school?

A. Yes.

Q. Because of this statute, because of this law?

A. Yes. Most children are from the first to the fifth grade.

Q. That is, most students go to the first to the fifth grade?

A. Yes.

Q. What do you mean by that?

A. Because the high grade in the English school, high school, no can stand it.

Q. They drop off?

A. That's right.

Q. Now, what percentage would you say from your whole student body, say your student body of one thousand, how many students in the first, second, third and fourth grades?

A. More than half.

Mr. Flynn: That has all been stipulated to.

Mr. Char: I see.

Mr. Flynn: More than half is inaccurate from their own figures.

Q. How about if you comply with this law, have you got any college students, any university students, that come to your high school or your school?

A. Very few.

[fol. 809] Q. Very few?

A. I think one, two or three, not more than five.

Q. Why?

A. Because plenty work in the English school in the university.

Q. Now, you have teachers who cannot speak English?

A. Yes, Mr. Leong.

Q. You mean that Mr. Leong there? (indicating) How many years he has been in your school?

A. He before me teach, a long time ago.

Q. How many years?

A. I don't know how many years.

Q. He cannot speak English?

A. No.

Q. Anyone else? He teach high school?

A. Yes.

Q. Now, anyone else you got who cannot speak good English in the high school, a teacher?

A. I don't know. You mean teacher? Plenty. But they go to work. They quit.

Q. In high school, how many high school teachers you have got?

A. I will count and see.

Q. You teach high school?

A. Yes, I teach high school and grammar school, all [fol. 810] class. Eight.

Q. Well, out of that eight, how many you think cannot speak English good?

A. Five.

Q. Suppose you follow this law, how many students you think you going to have in the school compared to your normal times before the law.

A. You mean start the school from this time?

Q. No, no.

A. The lower——

Q. Suppose you start school now, suppose you start open up the school now, how many students you going to get?

A. Hard to get. Not more than 200.

Q. Not more than 200? And these 200 are from what high grades or low grades.

A. All low grades.

Q. No high grades?

A. No high grades.

Q. Because during the war no more school for six years, then you draw from your students for first grade?

A. Yes.

Q. Over nine years old? Suppose you open the school now.

A. No more at all. Under this law?

Q. Yes.

[fol. 811] A. No can get so much. Hard to get the students.

Q. Hard to get students? Supposing there is no law, just like before, how many students you going to get?

A. Easy about 400.

Q. If you open up school now, you get easy 400?

A. Yes.

Q. And where they go? What grades?

A. From the first grade, six years old start.

Q. Only first grade?

A. First grade, second grade and third grade. First grade, more first grade, about 300 first grade.

Q. 300 first grade?

A. So many years, and they open the school——

Q. Why your school no open?

A. The law, under the law how can open the schools.

Q. On December 7, 1941, what happened?

A. All English and Chinese school, altogether had to close up.

Q. All close up?

A. Under the military law.

Q. And who came into your building? Who came into your school?

A. Who came——

Q. Who occupied since December 7, 1941.

A. After December 7?

[fol. 812] Q. Yes.

A. Nobody occupied.

Q. Nobody occupied?

A. All empty.

Q. How long then, somebody occupy?

A. Occupy 1942.

Q. What month?

A. June 15.

Q. June 15?

A. March, the military government send notice to me that they want school.

Q. Military Governor sent notice to you?

A. He want to lend the school.

Q. What?

A. Rent the school.

Q. Rent the school?

A. March the 1st, first part, he want to rent the school.

The Court: What year?

The Witness: 1942, until June 15, he move in.

Q. June 15, 1942, he move in?

A. Yes.

Q. Did you have some kind of a contract, writing?

A. Yes, first year get a lease and the next year send me—not need the lease. He want school, occupy the school until what day he like. That's the military. In 1946, [fol. 813] October 10, September 15, I think, move out.

Q. September 15, 1946, move out?

A. Yes.

Q. Could you get these military to go out before, could you tell them, you move out.

A. Tell me about 15 days before.

Q. No. I mean, could you as Principal of the school say, now I want back school? Could you tell them I want back school?

A. Who tell?

Q. You. You are the Principal of the School?

A. Yes.

Q. Now, during these years, from 1942 to 1946 September——

A. Yes.

Q. —did you ever tell the military and say, now I want this place back for school?

A. But he occupy the school. How can I get the school back?

Q. That is, your contract with them is, they say they want to stay in the school as long as they like and give you only one month notice when they want to vacate?

A. Yes, that's right.

Q. This school here, who own the school building and the grounds?

[fol. 814] A. That's the school association, Chinese association.

Q. And they own the grounds, too?

A. Yes, and the buildings.

The Court: Where are the grounds, where is it located?

Q. Where is it located?

A. 36 Kukui Street.

The Court: And what area?

The Witness: About 3—30,000 square feet, over.

Q. Over 30,000 square feet area?

A. Yes.

The Court: About three-quarters of an acre?
Mr. Char: That's right, your Honor.
The Court: It faces on Kukui Street?
The Witness: Yes.
The Court: Front on it?
The Witness: Yes.
The Court: How much along Kukui Street?

Q. How much frontage on Kukui Street.
A. 75, 75 in the front.
Q. 75 ft. in front?
A. Yes.
Q. How deep?
3. 300 ft. deep.
Q. 300 ft. deep?
A. Yes. 350, and another side is a curve.
[fol. 815] Q. You mean in the back it is curve, it bulges out?
A. Like——

The Court: What kind of buildings are there on it?
The Witness: Concrete, hollow tile.

Q. Hollow tile concrete building?

The Court: How big is that?
The Witness: 60 x 144.
The Court: 65?
The Witness: 60 ft. wide by 140.
The Court: One story or two story?
The Witness: Two story, the main building. Behind that we've got a civilian and small house.

Q. You have a civilian and two-story building?
A. Yes.
Q. Wooden building?
A. No—yes. One wooden building and two story wooden building, and small cottage.
Q. And then four cottages in the back?
A. Yes.
Q. Is that right?
A. Yes.

The Court: You can take care of a thousand students there at that school?
The Witness: Yes.

[fol. 816] Q. And you have also desks?

A. Yes.

Q. The school equipment there—you have also something like a basketball court, is that right?

A. Yes.

Q. How much is this building worth? I mean grounds that you own. How much is worth the grounds, buildings, and everything?

A. According to the tax office, -48,000.

Q. $48,000.00 of assessed value? That is for the buildings alone or for the whole thing?

A. Whole thing.

The Court: That is the tax assessed value, $48,000.00?

The Witness: Yes.

Q. Any mortgage on the premises?

A. No.

Q. Where did you get the money to put up this building?

A. Donate by the Chinese community?

Q. Chinese community?

A. Yes.

Q. Parents, too?

A. Yes.

The Court: Now it comes back to these annual donations. You haven't shown me yet what the amounts were.

[fol. 817] Mr. Flynn: I will stipulate to that. It is -4,000, I think, he said for that school.

The Court: Oh, yes.

Q. Have you got a regular curriculum too?

A. What kind?

Q. You got regular subjects?

A. What kind?

Q. I mean studies, have you got——

A. What kind of study? Time table?

Q. Yes, time table, about what study, what subjects, what hours, etc.

A. Two periods in one day.

Q. Two periods in one day?

A. Yes.

Q. From what time, when you begin school?

A. Begin three o'clock.

Q. Three o'clock?

A. Yes.

Q. To what time?
A. Fifty minutes one period.
Q. Fifty minutes one period and then you have got a recess?
A. Recess—20 minutes.
Q. Twenty minutes recess?
A. Yes.
[fol. 818] Q. And then fifty minutes?
A. And then another fifty minutes.
Q. And school is over?
A. Yes.
Q. From three o'clock to five o'clock?
A. Five o'clock.

The Court: What time is the public school allowed here to in Honolulu?
The Witness: Two o'clock.
Mr. Char: From nine o'clock to two o'clock.
The Court: To two o'clock. Public school hours are from nine o'clock to two o'clock?

The Witness: Yes.
The Court? And you commence at three o'clock?
The Witness: Yes.
The Court: And run until about five o'clock?
The Witness: Yes.
Mr. Flynn: I think the public school hours are generally about from 8:15 to two o'clock.
The Court: I believe that is right.

Q. 8:15 in the morning, 8:15 to two o'clock?
A. English school.
Q. Yes.
A. I don't know.

[fol. 819] The Court: Well, you make your school opening come about one hour after the public schools finish for the day, is that right?
The Witness: But the high school is fifteen minutes late.
Q. You mean 3:15?
A. Yes, the high class.
Q. From 3:15 to 5:15, is that right?
A. Yes.

The Court: Now, can this witness give any evidence on this paragraph here that parents are afraid to send their

children to school? That is, under the present law conditions. And that they are afraid to enter into contracts with teachers, and that the buildings and school facilities and equipment are depreciating in value, can he testify as to those things?

Q. You understand that? Can you testify? Any parents complain to you about this law? Any parents talk to you about this law?

A. Yes, plenty parents ask me open the school again.

Q. Open the school again.

A. Yes.

The Court: Under this law?

The Witness: Not under this law.

Q. Well, what did they talk about?

A. He wants to fight this case. They want to cancel this [fol. 820] law, then open this school. Plenty parents ask me to fight for this case.

Q. Now, these parents, did they ever ask you that they want to send their young children to school below the fifth grade?

A. Before——

Q. I mean while this law is in now.

A. Yes.

Q. In effect.

A. Yes.

Q. Any parents want to talk to you about sending their young children below the fifth grade to come to your school, did they talk about it?

A. Yes.

Q. What did they say?

A. They want to send the children to school six years, but under the law can't open the school yet. I mean, the parents ask me to open the school again.

Q. Are the parents afraid to send their children to your school because of this law?

A. Under the law.

Q. No, because of this law, they were afraid of this law?

A. Yes, because the Territory law—how can open school. But plenty children of parents ask me, parents ask me to [fol. 821] send their children to the Chinese school. But under this law I can't open the school again. I can't take the children under six years old, under seven years old.

Q. Now, these teachers, can you make contracts, make contracts and hire teachers to teach in your school now?

A. Hard to get.

Q. What? They are afraid of this law or what?

A. Yes.

Q. They are afraid they can't pass the English test?

A. How can they pass this test? All high school teachers now don't understand Chinese language.

Q. And the school cannot make contracts with them?

A. Yes.

Q. Now, you have many desks?

A. Got plenty desks.

Q. In the school building now?

A. Yes.

Q. Where are they?

A. In the school pavilion.

Q. All piled up, is that right?

A. That's right.

Q. No use at all? Can't use it?

A. Can't use.

Q. How about these buildings. How about these big [fol. 822] concrete buildings now?

A. I lease to Dr. Char.

Q. You lease to my brother, is that right?

A. Yes.

Q. Why did you do that? Why did you lease the building?

A. Because this law, this law—I can't open the school. I pay the taxes half year in our school. Lease to Dr. Char better than empty.

Q. When the military leased it, did you have any trouble to try to open up the school—that's why you leased it out, is that right?

A. Because I heard—he come to see Mr. Long.

Q. Mr. Long?

A. The superintendent, he said no open again, not allowed open again. So I lease school to Dr. Char.

Q. Now, how about the pavilion, the two story wooden building.

A. That is empty now.

Q. Nobody there?

A. Nobody.

Q. Not rented out?

A. No rent.

The Court: Have you got termites in the place?

Q. Have you got termites?

[fol. 823] A. Yes, I get janitor to take care, but plenty termites.

Q. And plenty termites in those desks too?

A. Yes.

Q. Wooden desks?

A. Yes.

Q. How abo t those cottages?

A. All termites, too.

Q. Two teachers use now, two cottages two teachers use, is that right?

A. Yes.

Q. This teacher using place and another teacher using the other cottage?

A. Yes.

Q. When this Chung Shan School started? How long ago started, the first time?

A. 1911.

Q. That is a corporation? Is that a corporation?

A. Yes.

The Court: Are you through with this witness?

Mr. Char: Yes, Your Honor.

The Court: Do you want to cross examine him?

Mr. Flynn: I will, your Honor.

The Court: All right. We will take a recess.

(A short recess was taken at 10:30 A. M.)

[fol. 824] After Recess

Cross-examination.

By Mr. Flynn:

Q. Mr. Young, you say plenty people, plenty parents ask you to open the school for the children?

A. Yes.

Q. Approximately what proportion of those parents have children below ten years old.

A. How much children's parents ask me?

Q. Yes, where the children are under ten years old.

A. Plenty. You mean the whole school?

Q. No, you say parents have asked you to open the school?

A. Yes.

Q. To begin with, about how many parents have talked to you?

A. Plenty.

Q. Well, what do you mean by plenty? Just approximately? Is it ten or thirty or seventy-five or what?

A. More than a hundred.

Q. More than a hundred parents now?

A. Plenty. I see them in the streets and they ask me.

Q. Well, say for example a hundred parents. How many of those would have children in the first four grades of regular school.

A. Parents, the children of the parents——

[fol. 825] Q. How many of the parents have young children?

A. Most.

Q. Too young for this law?

A. Most parents, they have children under the age——

Q. Most of them? Some of them have children in the fifth grade and higher?

A. Some.

Q. Some of them do? Now, you said the children in the fifth grade don't want to start first grade language school. Is that right?

A. First grade Chinese school.

Q. Yes.

A. In English fifth.

Q. Fifth or sixth?

A. Under the law, yes.

Q. You say they don't want to?

A. Yes.

Q. Now, the school has been closed for more than five years, is that right?

A. Yes.

Q. There is no Chinese language study for five years?

A. Yes.

Q. If the children in the fifth grade and up don't want to go, what is going to happen to that large number of children in fifth, sixth and seventh grades?

A. What that mean "what happened"?

[fol. 826] Q. Yes, do I understand from you that those children will never learn any Chinese?

A. Yes.

Q. They don't want to?

A. They want to learn but cannot open the schools for teaching.

Q. No, I am saying, assuming that you open the schools, the children have to be over the fourth grade regular school?

A. Yes.

Q. To go to your first grade. Well, for five years the children—for the past five years in the first grades of English schools they have no language school study. So any child in the fifth or sixth grade English school would have to go to first grade in your school now, wouldn't he?

A. Hard to learn the Chinese.

Q. Well, I am referring to a large number of students who are now in the fifth, sixth and seventh grades in English schools. Are they going to be forgotten as far as learning Chinese is concerned?

A. I no understand.

Q. You don't understand that question? Well, you said something, Mr. Young, that if you open the schools now without the law you can get 400 students.

A. Sure.

Q. For all grades or the first four grades or what?

[fol. 827] A. One, two, three, four, five.

Q. Five grades, you get a total of 400 students?

A. Yes.

Q. And do you say if you open the way the law requires, you get maybe 200 students?

A. Not more than 200, not more than 200.

Q. So that you might have half as many in your first four grades if you open up now under the law. Is that right, 200.

A. Not more than that.

Q. But maybe that many?

A. I don't know. I know not more than that.

Q. How do you know not more than that?

A. Because they get English school, some children's parents are scared of that law, because in the English school first, sixth and third and fourth grades every month get hard tests. If you not pass the English, you can't go into such school again. You must be tested English. You pass the English, then you go inside the Chinese school.

Q. You are assuming that they can't all pass that English test?

A. So the Chinese parents are scared of that law. They send the children to the Chinese school,—to send them to

school, they are scared to send them to the Chinese school.

Q. Do you know what that law requires as to English test?

[fol. 828] A. Yes.

Q. What is your idea.

A. Because it must be to pass that English. Then he can go to Chinese school.

Q. Suppose the law only requires that they pass their own grade, say they are in the fifth grade in English school. All the students pass, go on into the sixth grade, no additional standard English test—would that be all right with those parents?

A. They scared about that.

Q. They are still scared?

A. Yes. Under that law no freedom.

Q. Now, as far as teachers are concerned, teachers have to speak English, is that right, under the law?

A. You mean——

Q. The teachers in your schools, they have to know English too?

A. Yes.

Q. Do you have any idea how much English they have to know?

A. You mean the teacher?

Q. Yes.

A. Some teachers know nothing, only know the Chinese.

Q. How about some teachers that know a little English.

A. Some know plenty, some know little, some nothing.

[fol. 829] Q. Those teachers that know little English, can't they go to the Department of Public Instruction and try to get a certificate?

A. Hard to get, to pass.

Q. How do you know?

A. I know, because before I take examination before, 1932, I take one time examination.

Q. In 1932?

A. Yes.

Q. But have you or any other teacher gone up this time?

A. Yes, I go that time. I only pass history and grammar and Americanism.

Q. In 1932?

A. I fail two subjects.

Q. Did you or any of the teachers in your school go to the Department of Public Instruction this time, in 1945 or 6.

A. The same in 1932. Most teachers no pass.

Q. Do you know if it is the same or not?

A. I don't know, but I know before.

Q. You don't know what it is now?

A. I don't know now, but no tell me what kind of subjects to test.

Q. You never went to the Department of Public Instruction at all, did you, these last three years to see what they required, did you?

[fol. 830] A. But I heard Mun Lun School asked the superintendent. He not give anything—what's that—regulation, he no set them up. I don't know nothing.

Q. You heard that?

A. Yes.

Q. But you never went yourself, is that right?

A. I never go myself.

Q. And no teacher from your school went?

A. No.

Q. Now, you are only talking about the teachers that used to be in your school, is that right? You mean the same teachers you had before?

A. Before.

Q. Before the war?

A. Oh this time I can't tell. Maybe some teacher he quit. Maybe he don't like to teach now.

Q. Have you tried to find any of the teachers who can speak English?

A. He can speak English, the Chinese not much good. A good Chinese no can speak English.

Q. Have you tried to find any who can speak English?

A. What you mean, find that speak English?

Q. Did you try to find any Chinese people——

A. I never know. You want me to find some Chinese teachers in English?

[fol. 831] Q. Did you try?

A. Try this time?

Q. Yes.

A. But if you allow me open the school, I try to find. No open the school. What I find for?

Q. Well, you haven't tried at all.

A. But you don't allow me to open the school yet.

Q. Have you tried to open the school at all?

A. To find a teacher now—you must allow me to open the school, then I find the teacher.

Q. Have you tried to open the school according to the law?

A. Hard to open the school like that.

Q. You haven't even tried, though, have you?

A. But——

Q. My question is, have you tried, yes or no?

A. I haven't tried.

Mr. Flynn: No further questions.

The Court: You think you could pass English examination, examination in English, do you think you could?

The Witness: Teacher?

The Court: You.

The Witness: I don't know can pass or not. Before 1932 I take examination at that time.

The Court: You know what idiom is? Do you know what an idiom means?

[fol. 832] The Witness: Idiom? Idiom, English?

The Court: Yes, do you know what it means in English?

The Witness: Idiom, I know what it means, the term.

The Court: The what?

The Witness: Term.

The Court: Yes, that is an English word. You savvy what it means?

The Witness: Yes, idiom, I know that word.

The Court: What does it mean?

The Witness: Hard to talk about English, but the Chinese I understand.

The Court: Well, never mind. Is that all?

Redirect examination.

By Mr. Char:

Q. You never tried to go see Mr. Long, the Superintendent of the Department of Public Instruction, you never tried to see him?

A. I never see, but I heard Mun Lun——

Q. You heard that the Mun Lun School no can, so you didn't try?

A. That's right.

Mr. Char: That's all.

(Witness excused.)

The Court: Can you suggest any way of shortening this up?

[fol. 833] Mr. Char: Well, here is Mr. Dai Koong, Principal. They teach only four low grade students. It is practically the elimination of the whole school. Their classes are only from the fifth grade down. So if applying the law, they can't operate the school. They don't take students from the fifth, sixth and seventh grades up. For the next four years at least they can't operate.

The Court: What is the name?

Mr. Char: Dai Koong.

Mr. Koong: Koong, K-o-o-n-g.

Mr. Char: Where is your school? It is on Fort Street? What number Fort Street?

Mr. Koong: 1409.

The Court: 1494 Fort Street?

Mr. Char: He said it's been changed to a new number.

The Court: Well, between what streets?

Mr. Char: It's between School and Vineyard on the Waikiki side of Fort Street.

Mr. Flynn: I might save a little time, your Honor. I am willing to make the same stipulation as to the other schools, that the figures they give, they teach the first four grades and so many students and so much money from them. I make the same argument as I tried to make before, that they can still obtain older pupils to go into the first four grades. And I don't think there is any need to take evidence on that [fol. 834] on either side.

Mr. Char: If your Honor please, they have been teaching under the fifth grade, not older students, and they have the younger students up to nine and ten years old.

The Court: They've got a smaller place?

Mr. Char: Yes.

The Court: Do they own the place?

Mr. Char: You have no mortgage and its worth $10,000.00? How much the building? You own land and building? You bought it? How much worth?

Mr. Koong: 4,475.

Mr. Char: That is when you bought it? You bought it for 4,475?

Mr. Koong: Yes.

Mr. Char: When?

Mr. Koong: 1935.

Mr. Char: 1935?

Mr. Flynn: Well, I will stipulate that the building is valued as they say in the allegation, $10,000.00. No objection on that.

The Court: All right.

Mr. Char: I have the Principal of the other school. He is from the Mun Lun School. Will you stipulate to that?

The Court: That is the big one?

[fol. 835] Mr. Char: That is the big one.

Mr. Flynn: I will stipulate as to these facts, these facts in here, that they had 1,050 or 1,100 pupils before.

Mr. Char: That is the Principal of the public school and he will testify as to these figures mentioned in the pleading.

Mr. Flynn: Average attendance of 300 students in the first four grades, and annual average tuition fee of $500.00 for the first four years.

The Court: Well, I'd like to hear a little bit more about this claim that the parents are afraid to send their children to school, and that the school is afraid to enter into a contract with the teachers. Have you got any witness here that is in a position to give any evidence about that?

Mr. Char: I had the first witness there.

The Court: I know he did. Have you got any other witness? Have you got any witness that is a parent?

Mr. Char: Who is a parent?

The Court: And a prospective patron of the school if it were to open.

Mr. Char: I have a teacher, too, if your Honor please. And I have this old gentleman here. He hasn't been working at all for the past five years because the school can't open. That is his only livelihood.

Mr. Flynn: A teacher isn't a party before the Court, your Honor.

The Court: Fong Hing, have you got any children of school [fol. 836] age?

Mr. Char: He is the President of the school.

Mr. Fong Hing: Children are all big now.

Mr. Char: He is the President of the school.

The Court: How many you got?

Mr. Fong Hing: Fifteen children, all big.

The Court: All go to Chinese school before?

Mr. Fong Hing: Yes, sir.

WAH CHAN THOM, a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Char:

Q. What is your name?
A. Wah Chan Thom.
Q. And what is your business?
A. Business executive, Manager of Nu Enamel Company, 75 North King.
Q. And you are a product of any of these Chinese schools?
A. Yes.
Q. Which?
A. Graduate of Mun Lun School.
Q. That is, you graduate up to high school?
A. High school, yes.
Q. Are you married?
[fol. 837] A. Beg your pardon?
Q. Are your married?
A. Yes.
Q. Have children?
A. Three children.
Q. How old are they?
A. One is three, the other one is eight, and another one is eleven.
Q. They attend public schools?
A. Yes, two of them attending.
Q. Public schools?
A. Public schools.
Q. You understand the requirement under this 1943 Language School Statute?
A. Slightly.
Q. Have you read it?
A. Yes.
Q. Well, state whether or not you are afraid to send the children to the language school under this statute.
A. Well, according to my notion of the law you must pass the English test, so in case I send my daughter there, or my daughter is there, if she pass one year, well and good. In case they fail the next year, that means I have to yank them out. That sort of disrupts the learning process, I [fol. 838] should say. And I believe that is the opinion of

a lot of parents in refraining from sending their children to school under the law.

Q. Did your children go to this language school?

A. Never been, not yet.

Q. Language school?

A. No.

Q. Well, would you have sent these children to the language school if there were no such statute?

A. Of course I would. If it was in operation.

Q. How is that?

A. If it was in operation then.

Q. If it opened up now, would you send your eight-year-old child to the language school,

A. Yes.

Q. You would?

A. Yes.

Q. Even with this statute?

A. Well——

Q. With this statute you can't send them, is that correct?

A. I am afraid to send her there.

Q. You say you have a child of thirteen years?

A. Eleven.

Q. And that eleven-year-old is in what grade?

A. Seventh grade.

[fol. 539] Q. And you are afraid to send that eleven-year-old child to language school because of this statute?

A. Correct.

Mr. Char: That's all.

Cross-examination.

By Mr. Flynn:

Q. Mr. Tiom, your eleven-year-old child is in the seventh grade?

A. Yes.

Q. That is a girl?

A. Girl.

Q. And she was in the second grade when the war broke out in 1941?

A. I think so, second or third, I am not sure.

Q. But you *haven't* bothered to send her to the first two grades of language school then?

A. Well, they weren't in operation.

Q. Before the war, 1940, 41?

A. Well, I was just going to send her there. In fact, I already told the Principal that I would like to have her enroll in the school.

Q. She was in the second or third grade then?

A. Well, if I figured out, I think about that.

Q. Now, you say you think you are afraid of this English standard test?

[fol. 840] A. That is true.

Q. Have you ever gone to the Department of Public Instruction to see what it is?

A. No, I haven't.

Q. What is your idea of what that test is?

A. Well, I suppose they will give an English test and certain—drilling them in I should say, common everyday language, reading, etc.

Q. Well, your children in school, as you probably know already, have English tests from time to time, don't they?

A. True.

Q. Do you happen to know whether your little eleven-year-old girl has passed them?

A. She passed it so far.

Q. Passed it so far? If I would tell you that the law only requires any children to pass the regular grade in school along with the other students, only the passing, not higher than passing, not a hundred percent, would that lessen your fear any that you talk about?

A. Probably.

Q. If I tell you further that under the enforcement of the law there will be no requirement except that the children be passing for their own grade, the grade they are in, as far as going into language school is concerned, would that [fol. 841] make you feel any better about it?

A. I think so.

Q. But you have felt so far that this English standard test requires something higher than passing grade?

A. Well, it is up to the mercy of the examiner, set up according to the law.

Q. And you have felt that the examiner put the requirements so high that your children might not pass them?

A. Correct.

Q. But if I assure you that the only requirement is that they be passing for their grade, say that your girl in the seventh grade, if she passes her seventh grade regular tests

with the other children and not required to do any more, does that allay your fears?

A. Yes.

Q. Now, you have a child eight years old?

A. Correct.

Q. Is that a boy or girl?

A. Girl.

Q. And what grade is she in?

A. She is in third.

Q. She's in third grade? She will go in the fourth grade this coming year?

A. Possibly.

[fol. 842] Q. And has she passed her test so far?

A. Yes.

Q. Do you think it would be particularly harmful if you waited until after her fourth grade to let her go to language school?

A. Well, I think then she will be out of place because if she goes to language school the age will count a little and then the way of speaking the language is another hindrance.

Q. Well, you have told us your eleven-year-old girl has had no language school instruction.

A. Correct.

Q. Will she have to go to first grade in the language school?

A. Yes.

Q. Wouldn't she feel more out of place than your eight-year-old girl?

A. That is true.

Q. But you don't have any objection to sending her?

A. Well, I have no objection to sending her but I don't know whether she is willing to attend the school or not.

Q. Do you think your eight-year-old child would be more willing to go this year than next year?

A. Most probably.

Mr. Flynn: I have no further questions.

Redirect examination.

[fol. 843] By Mr. Char:

Q. From your experience, when you went up to the high school, didn't you find in your studies in high school that they were also difficult?

A. Well, at that time when I was young I had very little to worry over the two kinds of languages. I just take it as a matter of fact.

Q. You mean in the lower grades?

A. In the lower grades.

Q. You graduated from college?

A. Correct.

Q. Where?

A. University of Hawaii.

Q. Now, I mean from your experience, when you were studying in high school, studying high school in a language school, you were also in high school in the English school?

A. In the first, freshman.

Q. Is that right?

A. Yes.

Q. When you went to college, you didn't go to any high school, language high school?

A. No, I did not.

Q. In the University of Hawaii at that time, that is, the school ended about four o'clock in the afternoon?

[fol. 844] A. Well, in my courses it ended about 1:30.

Q. At that time?

A. At that time.

Q. You think your daughter could go to college and at the same time go to the language high school or grammar school?

A. Impossible.

Mr. Char: That's all.

Mr. Flynn: One further question, Mr. Thom.

Recross-examination.

By Mr. Flynn:

Q. You spoke of being afraid of sending your children to school because of the law. Were you speaking only of this English standard test that we were talking about?

A. That is true.

Q. No other fears than that?

A. No other fears. Well, fear, maybe if you want to take it in the sense of not getting a good teacher or proper teacher. It is just like the rest of the parents that they like.

Q. It is like the schools, isn't it?

A. Well, as a parent I want to send them to a good school and good teachers. I still have the fear of whether I will get the best teacher to teach my children.

Q. Well, you had that fear before, didn't you?

A. That is true.

[fol. 845] Mr. Flynn: No further questions.

Redirect examination.

By Mr. Char:

Q. That's what you meant, what you meant was that under this teacher taking the English test you feel that many teachers were good in Chinese but were not qualified under the English test, is that right?

A. Yes.

Q. And, therefore, the school could not select the best teachers in Chinese? Those could not qualify under the English test?

A. Correct.

Q. Is that right?

A. Yes.

Q. From your experience in this school, in Mun Lun School,—you graduated from there, is that right?

A. Yes.

Q. That is, the graduates of Mun Lun School, some of the teachers are teaching the lower grades?

A. Yes.

Q. But in the higher grades you have teachers who were taught in China—correct?

A. Correct.

Q. And if you eliminate that type, you are afraid that your children would not have the proper type of Chinese instruction?

[fol. 846] A. True.

Mr. Char: That's all.

The Court: Well, say that parents of children who understand both Chinese and English, and having children of school age whom you want to learn the Chinese language, what is your idea of the best kind of a teacher for a Chinese language?

The Witness: One who is well trained in the language, kind to youngsters, capable in getting them guidance in it, both in written and spoken language.

The Court: Well, you went to Chinese school from the first grade up. How long ago?

The Witness: It is about 20, a little over 20 years.

The Court: Did your teacher in the Chinese language understand, did your teachers in the language understand the English language, too?

The Witness: At that time very little.

The Court: And you feel, believe, from your observations, then and since that time, from your own experiences and from what you have gathered from others, you believe that the teachers who taught you were good teachers?

The Witness: Correct. And I would place my children under such teachers rather than those who can speak two languages. Particularly with my children because whenever I say something to them they will reply in English, and [fol. 847] I want them to reply in Chinese when they go to the Chinese schools.

The Court: Well, undoubtedly your children have a smattering of Chinese language understanding now. Is that not true?

The Witness: Yes, understand but they can speak very little, I must assure your Honor.

The Court: Is that generally true with the class of children here in this community who would be available to go to Chinese school.

The Witness: Very true, all second generation Chinese in the Territory, the children of the second generation, or to the third generation children. Personally I have given up hope of teaching them to speak Chinese at home.

The Court: You think it can't be done in any way that would be very useful to them?

The Witness: True, very difficult.

The Court: All right. Any further questions?

Mr. Flynn: No questions.

By Mr. Char:

Q. Mr. Thom, when you went to Chinese school in the early days from the first to the fourth grade, did you ever have—by studying Chinese and English at the same time, did that disturb your mind?

Mr. Flynn: I object to that. It's strictly the merits.

The Court: Yes, that is beyond the present examination.

[fol. 848] Mr. Char: That's all, your Honor.

(Witness excused.)

LUM YOUNG KAN, a witness in behalf of the Plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Char:

Q. What is your name?
A. Lum Young Kan.
Q. What is your business?
A. I am a retired merchant.
Q. The Chung Shan School, what position do you hold in it?
A. I am President of the Chung Shan School.
Q. How long have you held that position? How long have you been President?
A. Many years now. I think from 1941, 1940.
Q. Up to the present time, is that right?
A. Yes.
Q. You engage teachers, Chinese teachers?
A. Oh, yes.
Q. You engage teachers by the month or by the year or what?
A. They have contracts in teaching one year, every year.
Q. Every year?
A. Yes.

[fol. 849] Q. Do you have any difficulty now? Are you making contracts to get teachers to teach in your school should it open under the law, under this law?

A. Under this law it is pretty hard now on account—hard to get English teacher and Chinese teacher together. Most Chinese teachers know most Chinese, not much English in the school before.

Q. So you are afraid that you have difficulty in getting contracts with them, to employ the good Chinese teachers?
A. Oh, yes. It was before.
Q. How's that?
A. Was before; before time. Are you talking about now?
Q. Yes.
A. Well, we are looking for open the school and under the law we had to do it.
Q. You mean under the law you had what?
A. Under this law hire teachers now on account of many Chinese teachers don't know much English. The Chinese

teachers don't know much English, how to pass the law to teach.

Q. If the school should open, you are afraid that you cannot employ good teachers that you want?

A. Yes, very hard to get the teacher to teaching to the students.

Q. To teaching the students Chinese?

[fol. 850] A. Yes.

Q. Because of difficulty of passing the English?

A. Oh, yes.

Q. You have one teacher over here. How many years he taught school?

A. Mr. Leong, he teach many years now. Very good teacher high school.

Q. He cannot speak English?

A. I don't think so. He is a very good teacher.

Mr. Char: That's all.

Recross-examination.

By Mr. Flynn:

Q. Mr. Kan,——

A. Yes, sir.

Q. —have you tried to locate any teacher who can speak English?

A. Teach English together? Pretty hard to get now.

Q. Have you tried to get any?

A. Well, on account of, under the law cannot open. But I didn't try to get it.

Q. You didn't try to get any?

A. No, hard to get now, on account of English pass by law, I don't think so. Very hard to get the teacher to teach Chinese, English, to know both Chinese and English.

[fol. 851] Q. But you you haven't looked for anybody yet, who can?

A. Well, on account under the law I didn't looking for that.

Q. You haven't gone up to the Department of Public Instruction to see how much English has to be known by a teacher, have you?

A. Well, I didn't go yet on account of maybe some students from the school before, from the Chung Shan School or the Mun Lun School knows that. Maybe, I don't know.

Q. You haven't tried yourself?
A. I didn't try myself.

Mr. Flynn: No further questions.
The Court: That's all.

(Witness excused.)

COLLOQUY

Mr. Char: I have this teacher, if your Honor please.
The Court: You have what?
Mr. Char: I have this Chinese teacher.
The Court: Well, what will he testify to?
Mr. Char: Well, he will testify, if your Honor please, that he has been teaching, that all his life he has been teaching. He can't speak English and he is a well known scholar and poet, and he is not working.
The Court. He is not?
Mr. Char: He is not working. The only thing he can do is teach. In other words, he has been in the school there [fol. 852] not doing anything for the last six years. He wants to go to work but he can't, and he wouldn't be able to pass this English test. Therefore, if your honor please, the school cannot make a contract with him. The school cannot re-employ him. He is willing to teach, ready to go to teach. He lives in the premises.
The Court: Well, he has already been given a good character, a reputation as a high grade teacher?
Mr. Char: Yes.
The Court: And that is all that I would care for at least at this time. He may suffer detriment and loss but he isn't a party to this case.
Mr. Char: That is true, your Honor, but the school cannot employ him. There is a damage to the school and therefore the students that would like to have him as a teacher probably would go to him or not go at all. It is a damage to the school. It is just like in certain universities they have certain professors.
The Court: Yes, I can see that. Well, now, the matter that was under controversy now was to whether this court had jurisdiction in the matter of the value or amount involved in the claim.
Mr. Flynn: Yes, your Honor.
The Court: I am satisfied that the Court has jurisdiction as to these three schools.

Mr. Flynn: Well, I'd like to note an exception to the ruling, your Honor.

[fol. 853] The Court: Yes. The ruling, of course, is just as to the question of the amount involved.

Mr. Flynn: That is all, leading up the further point of my previous motion on the establishing of equitable grounds.

The Court: Well, you both discussed that at some length the other day.

Mr. Flynn: Yes, your Honor.

The Court: I am likewise convinced that there are sufficient and substantial grounds in equity to sustain the case in Court.

Mr. Flynn: If your Honor please, does that ruling hold that there are sufficient grounds to establish the case in this Federal Court to interfere with the operation of a state or Territorial law?

The Court: I wasn't thinking of that. I wasn't thinking of that just at the minute.

Mr. Flynn: Yes, your Honor.

The Court: Did you discuss that as fully as you would care to?

Mr. Flynn: I can't recall whether I completed it, your Honor. I would like to refer briefly just to a couple of our points.

The Court: Yes.

Mr. Flynn: Primarily now I will confine myself to the proposition that a Federal Court of equity will not interfere with the operation of a state law or any state proceedings [fol. 854] except in a clear and convincing case of immediate and great irreparable injury. That the main feature of the proposition is that the irreparable injury must be of a type that will result from the state action, and our proposition is that there is no irreparable injury where the only things threatened against the Plaintiffs is the action of a Court of equity in the Territory, Territorial jurisdiction.

The Court: Your point is that the injury must come from some action taken by the State?

Mr. Flynn: No, your Honor, not quite that. The point is that the remedy within the State jurisdiction must be adequate. In other words the State must have severe laws of penalties or forfeitures to cause the necessary irreparable injury which will give the Federal Court jurisdiction

over a matter which should ordinarily be within the cognizance of a State or a Territorial Court.

Now, I'd like to refer your Honor to an item in the 1943 Harvard Law Review, which I will find here in a moment. The article happens to go into the conflict between the Federal and State Courts.

The Court: Well, we don't have the Harvard Law Review in our library here, and if you want me to refer to that, I'd ask you to lay it before me.

Mr. Flynn: Well, I'd just like to tell your Honor what the point is very briefly.

[fol. 855] The Court: All right, go ahead.

Mr. Flynn: That the interferences by Federal Court with the operation of a state law or the operation of a state officer under a state law alleged to be unconstitutional has been confined to instances where the state law itself contains no sufficient remedy or opportunity for relief of the injured party. I will find this in just a moment, your Honor.

The Court: Yes.

Mr. Flynn: We say in our memorandum answering the memorandum of the Plaintiff's motion for a preliminary injunction:

"A decisive reason for denying equitable relief lies in the rule that a Federal Court will not enjoin the enforcement of a state law where the state law itself affords a means of presenting the Plaintiff's contentions."

The Court: I have read this somewhat extensively along those lines, more in connection with another case that was before the court that raises the same proposition. I can't say that I had any clear definite conception in my mind at the present minute just where that line lies. I will be glad to hear from you on the offering that you have on that.

Mr. Flynn: All right, your Honor. I will just repeat these references I made the other day, which are also contained in our answering memorandum. In one case, that of Cavanaugh vs. Looney, there was an action to enjoin state officials from filing a suit to condemn property under an allegedly unconstitutional law.

[fol. 856] The Court: What? Where is that found in the Cavanaugh case? I remember you referred to that the other day.

Mr. Flynn: That is found in 248 U. S. 453.

The Court: I haven't read that case yet.

Mr. Flynn: Well, that was an action to enjoin state officials from filing a suit to condemn property under an allegedly unconstitutional law. The Federal Court held that all the issues could be settled in a state suit, and that the trial court properly denied a preliminary injunction.

The other one I mentioned was North Port Power & Light Co. vs. Hartley, Governor of Washington, in 283 U. S. 568. It was an action to enjoin the bringing of a suit to forfeit land or account of alien ownership, under an allegedly unconstitutional statute.

The Court: Oh, yes, that was the Washington, State of Washington case. Yes, I read that.

Mr. Flynn: And it held that there were no grounds shown for equitable relief, that defenses the party had were available in the State Courts against any state action. That substantially is our point here.

The legislature took pains to provide a means for testing in a court of equity. It assessed no penalty, no accumulative fines or sentences, no forfeitures of property, no requirement of any expenditures of money other than any person in the country has to do.

[fol. 857] The Court: Well, possibly not as a basis but as a substance that that law was constitutional under the Federal Constitution and under the constitution of the State of Washington.

Mr. Flynn: Ultimately that was found, yes, your Honor, but on the point dealing with injunction they contended that there was no showing of any basis for equitable relief, without at that time passing on the unconstitutionality.

The Court: They didn't get to it——

Mr. Flynn: I am sure it holds that.

The Court: Maybe I confused that with another case. There was a Colorado case too, wasn't there? Wasn't there a case of the same kind?

Mr. Flynn: If you are referring to one of the alien land owning laws, I think there is, but I don't have that reference before me.

The Court: The one you are referring to was a condemnation?

Mr. Flynn: Condemnation.

The Court: Well, I am mistaken about the case.

Mr. Flynn: Yes, it is a condemnation suit. This is a Washington case. Maybe that is what your Honor has in mind. I think it is Washington.

Terrace vs. Thompson, in that case an injunction did issue because under the provisions of the state law there would have been a forfeiture of the party's land if he had made this contract.

[fol. 858] The Court: Yes, that is the case.

Mr. Flynn: That is the one. That is the nearest thing to the case before us on the Plaintiff's side. That is the strongest I came across in quite a few cases where an injunction was granted. And the Court said that the showing was sufficient. In other words, the risk of forfeiture of the person's entire area of land was too great to take a chance on breaking the law.

The Court: And the right to test the constitutionality.

Mr. Flynn: Yes, because of that enormous risk. Here there is no risk except the court of equity. And under the declaratory relief statutes of the Territorial laws, there would be adequate grounds to test it there without risking anything other than the time consumed in trying it, which is the same as the Plaintiffs are assuming now before the Court.

Rule 8 of the Federal Rules of Civil Procedure touches on the point without directly passing on it, to the extent of indicating, although not conclusively deciding, that the establishment of equity jurisdiction is something apart or over and above the establishing of the prima facie showing of general federal jurisdiction.

And then all the cases that I have cited here—they are in our memorandum—hold strongly that there must be a great prima facie showing of irreparable injury, danger of great and immediate injury, an injury for which the state law doesn't afford any opportunity for relief, before a [fol. 859] Federal Court of equity will step in and enjoin any state action.

The Court: Well, your contention, then, is that if the Plaintiffs or the petitioners here wish to seek the relief they are asking for in their bill before this Court, they should have taken the same proposition to the Territorial Court?

Mr. Flynn: Yes, about the same proposition. I think correctly they should have taken it directly to the Terri-

torial Court on a bill for declaratory relief, without giving them the burden of establishing grounds for an injunction. And I think that is where this case properly belongs. And I feel strongly on that because so many of the cases I have read on reaching the Supreme Court have not had decision on the merits but have been thrown back for jurisdictional reasons. And time and time again the Supreme Court seems to approve of the jurisdictional basis only on a very great showing. And I think the Plaintiffs' facts fall on the showing.

The Court: Your contention is that they would have no option, no right of election as to whether they should take their case to the Territorial Court or bring it to the Federal Court, that they are bound under the law to take it to the Territorial Court?

Mr. Flynn: I wouldn't hold that entirely, your Honor, if the proceedings were on a bill for declaratory relief. As to [fol. 860] a bill for an injunction, I insist and urge that they have not established or made any showing where a Federal Court of equity should interfere by injunction with state courts, or rather, state officers' functions.

The Court: Has it ever been settled whether an action for a declaratory judgment is on the legal side or the equitable side?

Mr. Flynn: I don't think so. In fact, I am not meaning to concede for a minute that this court would even have jurisdiction of the bill for declaratory relief because I have not read sufficiently on the law. What I have seen leads me to the probability that they, that the Federal cases would require virtually the same showing in a bill for declaratory relief as they would for a bill for injunction, in which case we would end up with the same jurisdictional difficulty, and in which case again the whole question would be involved if the proceedings were brought in the Territorial Court. I will concede that if it should be brought in the Territorial Court, I will simply go directly to the issue.

I am satisfied that our Territorial declaratory relief law is sufficient to cover them, that there is a controversary, and make a showing of needy declaratory judgment. But I have grave doubt all the way throughout whether the Federal jurisdiction attaches. That is the substance of it. I could say more but it would be accumulative. We have other references there.

[fol. 861] The Court: Well, you have gone through that and set out your authorities in your memorandum here that was directed toward a temporary injunction.

Mr. Flynn: Yes. The citations there are not confined to preliminary injunctions at all. They contain all the general problems of Federal jurisdiction.

The Court: I am going to require a little more time to go into that. There are quite a number of other duties around the court here. I am applying myself all day to one thing. Now, what if anything have you got to say in addition to what you have said about this, Mr. Char?

Mr. Char: If your Honor please, I haven't got anything to say except that the Tokushige case was on the same basis.

The Court: What?

Mr. Char: The Tokushige Case, Tokushige vs. Farrington Case. I have the pleadings here, and they also attach in their answer or in their objections that this court has no jurisdiction. That was before Judge Lymer at that time. They tried to show there was no irreparable damage. And all these other school cases, like the Pierce Case vs. the Society of Sisters, they speak of destruction of the school property.

The Court: Well, that is a little bit beside the question raised here now. Here are two courts, both having equitable jurisdiction. This matter arose out of a relationship with the Territory, and there is the Territorial court available. And that being so, this is a litigant entitled to come into [fol. 862] the Federal Court to settle his question, his controversary with the Territory, when the Territorial court is available to him for that purpose and to the same end and expense, isn't that about it?

Mr. Flynn: That is substantially it, yes, your Honor.

Mr. Char: Well, I say, your Honor, we could go to the Territorial courts, we could go to this court.—You see, the cases show, if your Honor please, unconstitutionality and irreparable damage, and those are the two things that require to give this court jurisdiction.

The Court: Well, if you could show those things, those same things to the Territorial court, they take cognizance of them to the same extent, do they not, that this court does?

Mr. Char: Yes, your Honor, but we have an election to take either one of the courts.

The Court: You claim you have the election?

Mr. Char: That's right, just as much as we have the election of remedies there, bringing an injunction in the Territorial Court, or I can ask them or get a declaratory judgment which was existing at the time when the Tokushige case vs. the Farrington case existed. There were both injunctions and they had at that time a declaratory judgment. That could have been taken care of over there. In fact, they went there first.

The Court: That is just about the time, I guess, when the declaratory judgment law was brought into the Territory. [fol. 863] Mr. Char: I think it is long prior to that, if your Honor please. That case was filed in 1923.

The Court: Well, yes, I guess it was a few years before.

Mr. Char: But the point is this, if your Honor please, in this federal jurisdiction all you have to show is the constitutional question of $3,000.00, in excess of $3,000.00 and irreparable damage. In fact, we had three elections. Set it up and get them to sue us, get an injunction against us, and restrain us from operating. Or we could say by declaratory judgment in the state courts. Or come over here and show those three qualifications, unconstitutional law, $3,000.00 and irreparable damages. In the Tokushige vs. Farrington Case, in fact they went to the State Court first, they went to the Territorial Court first and didn't get satisfied and then they filed this injunction in this court. I have the file here of the Tokushige case, which I would like to read from. It says in paragraph three—I will just read paragraph three, which is significant or pertains to the subject matter here.

"It does not appear that the Plaintiffs or any of them would suffer irreparable damage by the enforcement of the provisions or any of them of such statutes or by the issuance of a preliminary injunction herein. That the invalidity or unconstitutionality of a statute is not of itself alone a ground for equitable jurisdiction."

The Court: That's right.

[fol. 864] Mr. Char: And that the court has no jurisdiction to enforce or enjoin on unconstitutionality.

The Court: That is practically established.

Mr. Char: And also, if your Honor please, it is established that we have to show irreparable damage.

The Court: Yes.

Mr. Char: And we have shown, I think, irreparable damage.

The Court: Yes.

Mr. Char: And we have shown, I think, irreparable damage in this case here, that we can't—as in the Pierce case—we can't contract the teacher, we can't operate, the school buildings are empty. Termites are ruining the building and the tables and the school desks and equipment. And they are paying taxes on the premises. That is irreparable damage. They can't operate as a business. It is just the same as in the case of Pierce vs. the Society of Sisters. They have property for which they claim protection. The property is threatened with destruction through unwarranted compulsion.

The Court: Well, was the contention raised there that they were in a wrong court, that they should have gone to a state court?

Mr. Flynn: Is that the Pierce case?

Mr. Char: Yes.

Mr. Flynn: No, your Honor

Mr. Char: No. In this case they raised the question of jurisdiction. They said that the courts of the United States have jurisdiction because a Federal constitutional [fol. 865] right of the Plaintiff was invaded by the enactment in question.

The Court: Well, I can't see from my understanding that that alone would give them the right in a Federal Court.

Mr. Char: But in that case it will require to go into a State Court and determine that question, will involve a constitutional question and irreparable damage, and we are prevented from going into a Federal Court.

The Court: You claim that your cases do—

Mr. Flynn: The cases cited say just that. They say that they refuse to take equity jurisdiction.

Mr. Char: You mean when that point is raised?

Mr. Flynn: Yes, when there is a remedy in the state law.

Mr. Char: What is the remedy in the state law?

Mr. Flynn: To appeal to a court of equity. The only thing you are to be challenged with is the action of a court of equity. You can raise the same defenses as in this court, or the available other remedies, a bill for declaratory relief.

The Court: Could you not take your same claims, all of them that you presented here, to the Territorial Court?

Mr. Char: I could, if your Honor please, but I don't think it will prevent me from coming here.

The Court: That is what I want to find out. You haven't

got any authorities directly on that point as to your right of election as to where you should take your petition for remedies, have you?

[fol. 866] Mr. Char: I haven't, if your Honor please. I assume that in all these other cases that those points had properly been raised, that a Federal Court has just as much jurisdiction in this type of case as the Territorial Courts. And even if it is challenged——

The Court: Well, I feel that I will have to continue this matter over for maybe a couple of days to give me further time to go into that matter a little more. Today is Wednesday. How about Friday?

Mr. Flynn: Friday is all right with me, your Honor.

The Court: I think I can rule on your proposition by then.

Mr. Char: Friday?

The Court: But in the meantime, if either one of you want to call my attention to further additional authorities, from either side, I'd be glad enough to have them, because I would like very much to make up my mind correctly on the thing.

Mr. Flynn: May I bring that Harvard Law Review article to your Honor?

The Court: Yes.

Mr. Flynn: Only a couple of pages that are pertinent. And I will also call your Honor's attention to our entire answering memorandum that you refer to. The bulk of that goes to these contentions.

The Court: All right, nine o'clock Friday morning.

Mr. Char: Does that mean further evidence?

[fol. 867] The Court: No. No, I couldn't advise you on the idea of continuing the case, because I don't know at this time what may happen with it.

(The court adjourned at 12:10 P.M.)

[fol. 868] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 869] PLAINTIFF'S EXHIBIT "A"

Chinese Pupils by Grade in Oahu Schools

	Public (June, 1946)	Private (December, 1945)
Grade 1	222	100
Grade 2	260	94
Grade 3	263	97
Grade 4	267	114
Grade 5	270	127
Grade 6	276	162
Grade 7	276	169
Grade 8	286	139
Grade 9	345	175
Grade 10	371	154
Grade 11	325	141
Grade 12	344	131
Special	29	393
	3,534	1,996

[fol. 870]

PLAINTIFF'S EXHIBIT "B"
PRIVATE SCHOOLS

December, 1946 Report
CITIZENSHIP

Age	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	Boys	Girls	Total
Born in USA	1826	1984	1637	1460	1465	1294	1236	1198	1242	1405	1305	1201	925	301	108	9,577	9,010	18,587
Foreign Born			5	3	4	8	11	8	9	17	8	7	5	6	37	80	48	128

PRIVATE SCHOOLS BY ISLANDS

	Teachers			Enrollment		
	Men	Women	Total	Boys	Girls	Total
Oahu	163	453	616	7,854	7,347	15,201
Kauai		16	16	318	260	578
Maui	10	44	54	1,021	1,029	2,050
Hawaii	8	15	23	464	422	886
Total	181	528	709	9,657	9,058	18,715

OAHU ENROLLMENT BY GRADES

	1	2	3	4	5	6	7	8	High	Total
Publi	4451	4384	4252	4129	4007	4019	3975	3971	14,003	47,191
Parochial	914	783	722	660	678	545	635	564	1,697	7,198
Other Private	615	502	523	422	434	408	427	531	2,413	6,275
Total	5980	5669	5497	5211	5119	4972	5037	5066	18,113	60,664

[fol. 871] PLAINTIFF'S EXHIBIT "C":

The Effect of Attendance at Chinese Language Schools on Ability With the English Language

Percival M. Symonds

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Purpose

This study is an attempt to throw light on the foreign language school problem which is perplexing Hawaii. There is a definite sentiment among the leading thinkers in Hawaii that the schools conducted privately in Oriental languages are detrimental to Americanization and racial assimilation. This is one aspect of the broad wave of Americanization which was one of the results of the World War but is intensified by the persistent hostility of California to the Oriental on the western coast. Naturally, the sentiment against the foreign language schools in Hawaii, which has recently crystallized into regulating legislation, is founded on definite reasons. There are three of the reasons which are current: (1) The foreign language schools are unpatriotic, if not positively seditious, (2) the foreign language schools, coming as they do as an extra daily burden of confinement in school and of mental activity, are detrimental to the health of the boys and girls attending them, (3) the foreign language schools retard the children in the public schools and handicap them in their acquisition of the English language. The first argument is exceedingly difficult to substantiate with positive evidence. The second and third arguments are verifiable by evidence if trouble is taken to secure the facts. It is the purpose of this study to determine what influence, if any, attendance at a school conducted in an Oriental language has on the acquisition of and ability to use the English language.

[fol. 872] The real opposition to these schools in Hawaii is directed against the Japanese language schools. The Chinese and Korean language schools pass almost unnoticed. This is for two reasons. First, and probably most important, the Japanese are suspected because of their imperialistic and militaristic tendencies as a race and there is fear that we may have, growing up in our midst, a people

who have such sympathy toward their fatherland that in time of discord it might lead to definite allegiance with Japan. It is the fear of a hyphenated-American group who might, as the German-Americans during the war, play treacherous, which is the background of the real opposition to the Japanese language schools. There is no analogous fear of the Chinese and Korean language schools. But the second reason, which supports the first, is that the Japanese language schools so far outnumber the rest of the language schools. The figures from the inspector of Language Schools of the Department of Public Instruction for June 15, 1923, tell the story.

	Pupils	Teachers	Schools
Japanese	18,920	325	137
Chinese	1,170	27	8
Korean	241	14	9
Russian	21	1	1
	20,352	367	155

Unfortunately, practically all the Japanese children attend schools in their own language (besides the public schools) so that it was impossible to study the effect of language school attendance on their English ability. After casting around it was discovered that not all the Chinese children attend schools in the Chinese language. In fact, the proportions of those who do and those who do not attend such schools are roughly equal. Accordingly, it was proposed to study a number of Chinese children who have attended schools conducted in the Chinese language and an equal number of those who have not attended such schools to see if there is any difference in their ability to treat with the English language. Since the real contention is over the [fol. 873] Japanese language schools, it is unfortunate that this study could not have been made on them. The results of this study, however, ought to be applicable to schools conducted in any Oriental language. While Chinese and Japanese are not the same language, in fact, are as different as French and German, they resemble each other in certain respects, especially in their written symbols and probably are enough like each other and unlike English to make the results of this study apply to the Japanese situation. All that can be definitely claimed is that the results are true for the Chinese. They ought to give the careful thinker and shrewd observer material so that he may draw more correct conclusions than he otherwise might as to the influence of the Japanese schools.

Method

The most obvious way to attack this problem is to find what retardation there exists in the public school progress of those children who have attended Chinese language schools as compared with those Chinese children who have not attended these schools. If children who have attended Chinese language schools are older, grade for grade in the public schools, than those who have not attended Chinese language schools, and the intelligence of the two groups is the same, then we may attribute this retardation to factors in the environment among which would be the Chinese language schools. And since ability to progress in public schools is dependent on the ability to use and understand English language, such retardation would be evidence of a difference in their ability in English. Such retardation, if it exists, might well be due to differences in the home environment. Accordingly, if it is possible to eliminate the language influence of the home, what difference exists might properly be attributed to the Chinese language school, the only other powerful differentiative influence in the child's life.

But a more direct and more accurate method than that of studying the grade retardation is measuring the children with tests which deal with various phases of their English [fol. 874] ability. Such a method is more direct as it measures the English ability directly and does not depend on any hypothesis of progress in school waiting on English language ability. Such a method is more accurate because whereas 77 per cent of the children are measured by a reading test (Thorndike-McCall) within a year of their true reading ability, as pupils are usually graded (on the basis of the teacher's judgments and improvised examinations) only 56 per cent are in the grade which most nearly fits their ability.[1]

[1] Kelley found in the standardization of the Stanford Achievement Test that in four California school systems only 35 per cent of the children were in the grade which most nearly fitted their ability.

The following tests were selected to measure various phases of English ability:

Thorndike-McCall Reading Scale, Form 3.
Thorndike Test of Word Knowledge, Form A.
Kelley-Trabue Completion Exercise Alpha.
Charters' Diagnostic Language Test, Miscellaneous A, Form 1.

Besides these four tests Pintner's Non-Language Mental Tests were given. These tests are wholly independent of language even to the directions. The directions are given in the form of illustrative exercises on the blackboard. However, oral directions are also given. I doubt if this was the slightest advantage to any, as all the children are able to understand simple spoken English. Naturally, the tests depend on acquired experience, but it is experience that is shared by all groups alike and hence the test is a good measure of inmate intelligence.[2] Non-verbal tests never have

[2] In this connection it was suggested that children who have attended a Chinese language school would have an advantage in this Pintner Non-Verbal Test because of the similarity of the material to Chinese symbols, especially in tests 2 and 3. To check this I computed the performance of the two groups (those who have never attended and those who have attended Chinese language school) for tests 1, 4, 5 and 6, also tests 2 and 3, and obtained the correlation between test performance and having attended Chinese language school (bi-serial r). The correlation between tests 1–4–5–6 and having attended Chinese Language School is +0.225. The correlation between test 2–3 and having attended Chinese language school is +0.225 (by chance, just the same). The scores on 2–3 were jammed at the top of the test and hence before the bi-serial formula could be used a correction for σ had to be made using formula 188 on p. 227 of Kelley's "Statistical Methods." The careful reader will note later that the total Pintner Non-Verbal Test correlates with attendance at Chinese language school +0.282. I attribute this to the fact that since no correction has been made in tests 2 and 3 for jamming at the top, the σ in the bi-serial r formula is too small.

The conclusion of this is that the Pintner Non-Verbal Test is a valid test by which to compare the intelligence of

[fol. 875] shown quite the validity that verbal tests have shown. The writer takes it that this is because it is more difficult to devise non-verbal tests which make the same demands on thought that verbal tests do. But since we are using these tests to determine average performance on large groups, they ought to show average levels of innate ability as accurately as could be desired.

These tests were given to Chinese children in two elementary schools in Honolulu which I shall call schools A and B. The tests were given about a week apart in March, 1923. A morning was used to give all the tests in a given school but the order in different rooms was different. The tests were given by six of my students in Education, my wife and myself, and the conditions under which they were given were very satisfactory.

What the Age Grade Figures Show

When the sheets were sorted into the three piles which showed the number who have or have not attended Chinese language school, they made groups of the following sizes.

	Years of Attendance at Chinese Language School			
	Never	0 to 2	2-	Total
Public school A	87	52	141	280
Public school B	71	52	110	233
Total	158	104	251	513

[fol. 876] The statistical age constants by grade are:

Years Attendance Language School	Grade				
	IV	V	VI	VII	VIII
	Mean age in years				
0	11.36	12.36	13.35	14.36	15.10
0-2	10.96	12.00	13.32	14.43	15.29
2-	11.21	12.03	13.26	14.50	15.52
	σ				
0	1.40	1.25	1.41	1.15	1.02
2-	1.13	1.28	1.24	1.27	1.18
	σ_M				
0	0.28	0.27	0.27	0.31	0.27
2-	0.14	0.17	0.18	0.21	0.18

our two groups. I wish to stress here the fact that there is no appreciable transfer even in the case of material which so closely resembles Chinese symbols.

To determine whether the differences in age in a given grade between those who had never attended Chinese language school and those who had attended two years or more were significant the σ's of the differences were obtained, using the formula:

$$\sigma d = \sqrt{\sigma^2 + \sigma^2}$$

	Grade				
	IV	V	VI	VII	VIII
σd	0.31	0.32	0.32	0.37	0.32
$\frac{d}{\sigma d}$	0.48	1.03	0.28	0.38	1.31

and the probability that such a difference is a real difference and not a difference dependent on chance is very low.

The correlation between age and having attended language school using bi-serial

$$r = \frac{M_2 - M_1}{\sigma'} \times \frac{pq}{Z}$$

$$\sigma r = \frac{\frac{\sqrt{pq}}{Z} - r^2)}{\sqrt{N}}$$

	Grade				
	IV	V	VI	VII	VIII
r	−0.11	−0.16	−0.03	−0.06	−0.18
σr	±0.10	±0.11	±0.13	±0.17	±0.23

This tells the same story as the former—that the numbers are too few to give a significant relationship between grade retardation and attendance at language school.

Thinking that perhaps a *summation* of differences in grade retardation might yield a significant result I tried the following. Slipping the distribution of the 5th grade down one year (as though the whole grade had never been promoted from the fourth grade), slipping the distribution of the sixth down two years, etc., I summed the distributions across and found the difference in means of these total distributions. This is the equivalent of finding a weighted average of the separate grade differences.

Calling the mean of the group that had never attended language school as par, the group that has attended 0 to 2 years is 0.24 of a year younger per grade and the group that had attended 2 or more years is 0.14 of a year younger per

grade, where the $\frac{a}{2}$ of this last difference is 0.08. Here again we find no significant difference. On the basis of these figures it seems that the Chinese foreign language schools do not have a retarding influence which is appreciable with the number of children used in this study.

What the Tests Show

The method of correlation was used to interpret the test results. Bi-serial r was used in the correlations with attend- [fol. 878] ance at language school. Chronological age and intelligence (non-verbal) was eliminated by partial correlation.

For convenience, let the following numbers symbolize the units used:

	M	σ
	Years	
0. Grade		
1. Age	12 9	2 00
2. Pintner-Non-Verbal	32 2	93 25
3. Thorndike-McCall Reading	20 4	5 57
4. Thorndike Word Knowledge	37 5	17 3
5. Kelley-Trabue Completion	5 37	1 32
6. Charters Language	13 6	7 23
7. Attendance at Language School		

Correlations
(Number in parenthesis are σr)

	1	2	3	4	5	6	7
0	+0 751	+0 385	+0 747	+0 769	+0 601	+0 697	+0 109
	(0 109)	(0 037)	(0 019)	(0 019)	(0 028)	(0 023)	(0 058)
1		+0 386	+0 507	+0 555	+0 451	+0 491	+0 048
		(0 037)	(0 033)	(0 031)	(0 035)	(0 034)	(0 058)
2			+0 486	+0 439	+0 398	+0 376	+0 282
			(0 034)	(0 036)	(0 037)	(0 038)	(0 054)
3				+0 759	+0 711	+0 741	+0 074
				(0 019)	(0 022)	(0 019)	(0 058)
4					+0 684	+0 754	+0 047
					(0 023)	(0 019)	(0 058)
5						+0 698	+0 009
						(0 023)	(0 058)
6							+0 107
							(0 058)

[fol. 879] The four first order correlations show that there is practically no relationship between having attended a Chinese language school and ability with the English lang-

Four first order correlations

	r	σr	
r_{0x}	+0 058	(0 058)	
r_{1x}	+0 024	(0 058)	The formula used to compute
r_{2x}	−0 015	(0 058)	the σr is that for bi-serial r
r_{3x}	+0 096	(0 058)	

uage. The correlation $r_{27.1} = +0.286$ (0.054) shows that there is a significant positive relationship between intelligence and attendance at a Chinese language school.

Second order coefficients

	r	σr	
$r_{37.12}$	−0.052	(0.058)	
$r_{47.12}$	−0.062	(0.058)	The formula used to compute σr is that for bi-serial r
$r_{57.12}$	−0.101	(0.058)	
$r_{67.12}$	+0.032	(0.058)	

This gives us the correlation between the various language functions and attendance at Chinese language schools with age and intelligence rendered constant.

	Reading	Vocabulary	Completions	Language
$\frac{r}{\sigma r}$	0.90	1.07	1.74	0.55

None of these is significant. The language school has apparent slight retarding effects in the different functions, but the numbers used in this study were not large enough to make this certain. Note that the language test shows a positive (although inconclusive) correlation with attendance at language school.

[fol. 880] If we take the average of the four correlations (−0.045) and multiply the population by 4 making $\frac{r}{\sigma r} = \frac{0.029}{0.019} = 1.55$ giving only a low probability (16 to 1) that there is a retarding influence coming from the Chinese language school.

Our final problem is to locate the cause of this retardation in English ability. Such retardation must occur where these children who are retarded are handicapped in their English ability. These places may be (1) of the Chinese language school, (2) the home. I can think of no other place where those children who do not attend language school are going to have any extra advantage in acquiring English. Certainly the public school, playground, street or moving picture house is not going to discriminate between children who have and children who have not attended Chinese language school.

The following tabulation shows which language is commonly reported in the homes of these children:

Years of Attendance at Chinese Language Schools	Language spoken in the home: Chinese	Both Languages or Doubtful, or Unknown	English	Totals
0	132 (84%)	16 (10%)	10 (6%)	158
0-2	73 (75%)	16 (35%)	10 (10%)	104
2	204 (81%)	32 (13%)	15 (5%)	251
	414	64	35	513

There is no difference in the relative amounts of Chinese and English spoken in the home for the different groups as reported by the children. I must conclude therefore that the retardation of about five months for a twelve year old child in ability in English is caused by attendance at the Chinese language school.

Influence of the Language in the Home

It was shown earlier that there was no correlation between attending foreign language school and speaking English in the home. Several interesting things come out of a study of the 35 children who say they come from English speaking homes. [fol. 884]

	Children from English Speaking Homes	All Chinese Children
I.Q.	99.4	99.3
R.Q.	86.3	88.3
V.Q.	98.8	95.4
C.Q.	83.3	85.2
T.Q.	88.2	90.9
R.R.	86.9	88.8
V.R.	99.5	96.0
C.R.	84.4	85.7
L.R.	88.7	91.5

The numbers are too small to make any differences significant. It is evident that the children are of about the same brightness as those who come from Chinese speaking homes and are not at all superior in their English ability to those children. Note that they excel in vocabulary and are inferior in their recognition of language errors. Putting this last with the small positive correlation found between attendance at language school and language leads me to surmise that there is something of significance here. Those children who learn their English at school learn better Eng-

lish than when they learn poor English at home. The imperfect English which the home furnishes results in poorer language habits as far as grammatical correctness goes than when they hear no English at home. Correct speech has a worse enemy in the Pidgin English of the home than in the Chinese language school. On the other hand, English in the home results in a larger English vocabulary than when the conversation and thought is in Chinese. Here again the Chinese language school works to prevent the growth of the vocabulary by requiring expression and thinking in Chinese. I estimate that the influence of the home and playground is about four times as great as the Chinese language school in causing retardation in the English language.

[fol. 882] Practical Conclusions

The first conclusion to be drawn is the fact that differences among individuals far exceed differences caused by any one social agency—far exceed differences caused by attendance at a Chinese language school. The distribution of I.Q.'s shows this plainly. I hope that those who are interested in education in Hawaii will consider this fact seriously. We have been afraid of the inffuence of the foreign language school and yet the influence of the foreign language school is only about one-fiftieth of that influence that gives one twelve-year-old child the ability of the average child of nine and another twelve-year old child the ability of the average youth of fifteen. What is this factor which produces these really remarkable differences? Home conditions may account for part of these differences, but heredity is also a large factor. If we are really interested in the English of the children and the kind of English they will speak as adults we had better let the foreign language school alone and turn our attention to the home, the playground, and to the kind of individuals who are born. Of course, these factors are practically impossible to influence, but that shows us that the language situation cannot be changed overnight. The public schools on the islands are doing a heroic and effective work along this line.

The second conclusion is that the effect of the Chinese language school on the English ability of its students is so small as to be negligible. If I am not mistaken, it is the gross correlation of attendance at foreign language school

and ability in English that is the bone of contention. As we have seen that is negligible, but, if anything, is positive. Taking Chinese children as you find them, they are not noticeably retarded in English because of attending foreign language schools. Chinese children who attend Chinese language schools are neither younger nor older in their grades than those who have not attended Chinese language school.

I take it that the real retardation of the children who attend Chinese language school because of their superior intelligence does not enter into the controversy. People, in [fol. 883] general, do not care whether children are achieving what their ability warrants so long as they keep up with their school mates. But to the educator and to the psychologist these children who attend Chinese language school are probably slightly retarded from what they would have achieved if they had not attended the foreign language school. Since this small retardation cannot be due to home condition, we must ascribe it to the foreign language school as the only differentiating factor. This retardation is practically nil in language habits. The retardation shows itself in their stock of English words and in their ability to use these English words to express their thoughts.

[fol. 884] PLAINTIFF'S EXHIBIT "D"

Honolulu, T. H.,
March 19, 1923.

Honorable Clarence H. Cook, Speaker, House of Representatives:

SIR:

Your Commission of Education to which are referred House Bill No. 139 introduced by the Honorable W. A. Clark, entitled "An Act to Amend Sections 1, 2, 7 & 8 of Act 30 of the Special Session of 1920, relating to foreign language schools," after due and careful consideration, begs to report as follows:

Section 1 of this bill amends Section 1 of said Act by further providing that all subdivisions and activities under the direction, management or supervision of any foreign language schools shall be subject to the provisions of said Act.

Section 2 amends Section 2 of said Act by adding thereto a new paragraph providing (a) for the filing by every person conducting a foreign language school not later than June 15 of each year, beginning with the year 1924, a sworn list of all pupils enrolling during the current school year showing the name, sex, parents or guardians, place of birth and residence of each child; (b) for the collection by such persons conducting such school for each school year and enrollment fee of One Dollar ($1.00) from each pupil attending such school in such year, making the payment of said enrollment fee as the condition precedent to his or her attendance at such school; (c) that said fees collected, be paid to the Treasurer of the Territory and appropriated to the department (meaning the department of public instruction) to be expended in enforcing and carrying out the provisions of said Act.

Section 3, which practically repeals Section 7 of said Act gives the department full power, from time to time to prescribe the subjects and costs of study of all foreign language schools, and the entrance and attendance prerequisite or qualifications of education, age, school attainments demonstrated mental capacity, health and otherwise of pupils [fol. 885] attending said school, but also provides that no pupil shall attend a foreign language school after September 1, 1923, unless and until he or she shall have satisfactorily completed at least the first and second grades of their American public school or the equivalent thereof. It provides that the department shall prescribe the textbooks to be used in any foreign language schools and authorizes the department to prepare or cause or prepare or procure or arrange in procurring suitable textbooks for the teaching of Oriental languages, in both public and foreign language schools in the Territory and to enter into agreements in the publication and sale of the same. It further provides that all royalties, commissions and moneys received by or on behalf of the department in connection with the publication or sale of such textbooks shall be paid over to the Treasurer of the Territory and appropriated to the department to be expended for the purposes of said Act, and that after September 1, 1923, no course or courses of study and no textbooks shall be used in any foreign language schools except the ones prescribed or permitted by the department.

Section 4 amends Section 8 of said Act by prefixing a new paragraph thereto, giving the department the power to appoint one or more inspectors of the foreign language schools and to pay the salaries and necessary expenses in connection therewith, said inspectors and other duly authorized agents of the department to have the right freely to visit said language schools and to inspect the buildings, equipment, records and teaching thereof, and the textbooks used therein.

The phraseology of Section 2, every person conducting a foreign language school is made, practically, the agent and department for the collection of enrollment fees of One Dollar ($1.00) per pupil.

We believe it would be better to provide for a license or fee to be paid by the person conducting such school, the amount of such license or fee to be based on the school attendance and computed on the average attendance of the previous year at the rate of One Dollar ($1.00) per pupil.

[fol. 886] A provision should also be made that on July 1, 1923, and annually thereafter, all permits, in order to be valid must be renewed, unless previously forfeited, and that the department shall not be required to renew the permit *and* any foreign language school that has violated the terms or provisions of this Act. We believe that all permits, licenses, certificates or consents of every kind or nature heretofore issued by the department in any foreign language schools or to any person or persons conducting such a school should be declared of no effect 15 days after this bill becomes law, and that new permits be issued in accordance with the provisions of said Act 30, as amended.

Section 7 of this bill authorizes the department to procure textbooks for the teaching of Oriental language in both public and foreign language schools. Section 2 of the bill, among other things, provides that all moneys collected thereunder be expended in carrying out and enforcing the provisions of said Act.

There is no doubt as to the legality of using this money for any purpose other than one connecting directly with the regulating of the foreign language schools. In the amendments we propose to this bill *are* idea is not that of prohibition or abolition is planned by that its main purpose is a plan of program of Americanization and even though the regulations set forth in the bill as amended and such further

regulations as the department may make under said Act, as amended, may eventually bring about abolition. We should not hold back on a bona fide program of Americanization bearing in mind that the *of the* pupils of these foreign language schools are under our constitution *are* little American citizens.

We, therefore recommend to amend the bill as follows:

Amend Section 1 by inserting the words "language school" and "shall" not lame pay thereof, the words "with whatever language must be used to such subdivisions and or activities to".

Amend *Act* 2 of Act 30 of the Special Session Laws of 1920 is hereby amended by adding thereto a new paragraph to read as follows:

[fol. 887] "No person shall, after fifteen days from the passage of this Act, conduct a foreign language school in the Territory of Hawaii without a written permit from the department of public instruction. All permits, licenses, certificates or consents of every kind or nature, and no matter under what law the same were issued, that have been heretofore issued by the department to any foreign language school, or to any person or persons conducting such school, shall be and are hereby declared to be cancelled and of no effect. After July 1, 1923, no permit shall be issued without a fee being paid therefor, the amount of which fee shall be based on the school attendance. The said fee shall be computed on the average attendance of the previous year at the rate of one dollar ($1.00) per pupil, except as to schools just starting, whose fee shall be computed at the same rate on the estimated average attendance and shall be correctly adjusted at the end of the school year, on the basis of the actual average attendance.

On July 1, 1923, and annually thereafter, all permits, in order to be valid, must be renewed and shall, unless previously forfeited, be renewed by the department on the payment of a fee determined in the same manner as above specified; provided, that the department shall not be required to renew the permit of any foreign language school that has violated the terms or provisions of this Act. All of said fees collected by the said department shall be paid over to the Treasurer of the Territory of Hawaii, and the moneys so paid are hereby appropriated to the department of public instruction to be expended in enforcing and carrying out the provisions of this Act.

Every person conducting a foreign language school shall, not later than June 15 of each year, file with the department on forms prescribed or furnished by it, a sworn list of [fol. 888] all pupils in attendance at said school during the current school year, showing the name, sex, parents or guardians, place of birth and residence of each child; provided, however, that the department may, on cause shown, modify the requirements of this sentence during the year 1923.'"

And a new section to read as follows:

"Section 3. Section 4 of Act 30 of the Special Session Laws of 1920 is hereby amended to read as follows:

'Section 4. No permit to teach in a foreign language school shall be granted unless and until the department is satisfied that the applicant for the same is possessed of the ideals of democracy; knowledge of American history and institutions, and knows how to read, write and speak the English language.

Provided, however, that the provision concerning knowledge of the English language shall be liberally construed during the two years after this Act goes into effect; it being understood that it would be difficult within that time to secure teachers fully qualified under this section and at the same ~~time~~ qualified to teach a foreign language. And provided, further, and it is hereby declared that the object of this Act is to fully and effectively regulate the conducting of foreign language schools and the teaching of foreign languages, that the Americanism of the pupils may be promoted; and the department is hereby directed to carry this Act into effect in accordance with the spirit of this declaration.'"

Delete the whole of Section 3 and insert in lieu thereof the following:

"Section 4. Section 7 of Act 30 of the Special Session Laws of 1920 is hereby amended to read as follows:

'Section 7. The department shall have full power from time to time to prescribe by regulations, the subjects and [fol. 889] courses of study of all foreign language schools, and the entrance and attendance, prerequisites or qualifications of education, age, school attainment, demonstrated mental capacity, health and otherwise, and the textbooks to be used in any foreign language school.

Until otherwise provided by the department the following regulations shall be in effect:

From the present up to September 1, 1923, every pupil shall have first satisfactorily completed the American public school first grade, or a course equivalent thereto, before attending, or being allowed to further attend, any foreign language school.

Beginning September 1, 1923, and thereafter, every pupil shall have first satisfactorily completed the American public school first and second grades, or courses equivalent thereto, before attending or being allowed to further attend, any foreign language school.

Beginning September 1, 1923, and thereafter, for grades one, two and three; beginning September 1, 1924, and thereafter, for grades four and above; all new textbooks used in elementary foreign language schools shall be based upon the principle that the pupil's normal medium of expression is English and shall contain, as far as practicable, English equivalents for foreign words and idioms.

The department is hereby authorized to prepare or cause to be prepared or procure or arrange for procuring suitable text-books for the teaching of foreign languages in the foreign language schools and to enter into an agreement or agreements for the publication and sale of the same. All royalties, commissions and money received by or on behalf of the department in connection with the publication or sale of such text-books shall be paid over to the [fol. 890] Treasurer of the Territory and are hereby appropriated to the department to be expended for the purposes of this Act. In every foreign language school no subject of study shall be taught, nor course of study followed, nor entrance nor attendance qualifications required, nor text-book used, other than as prescribed or permitted by the department; provided, however, that the regulations set forth in Section 7 of this Act shall be effective until superseded in part, or in whole, by others made by the department."

Renumber Section 4 to read "Section 5."

And a new section to read as follows: "Section 6. Act 30 of the Special Session Laws of 1920 is hereby amended by adding thereto a new section to read as follows:

"Section 10. If any section or part of this Act be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the Act as a whole, or any

part thereof which can be given effect without the part so decided to be unconstitutional or invalid.'"

Add a new section to read as follows: "Section 7. Act 30 of the Special Session Laws of 1920 is hereby amended by adding thereto a new section to be known as Section 11, and to read as follows:

'Section 11. This Act shall take effect on the first day of July, 1921.'"

Renumber Section 5 to read "Section 8."

Amend the title to read as follows:

"An act to amend Sections 1, 2, 4, 7, 8 and 10 of Act 30 of the Special Session Laws of 1920, and to add thereto a new section to be known as Section 11, relating to Foreign Language Schools."

With these amendments we recommend the passage of the bill.

[fol. 891] Respectfully submitted, E. M. Muller, Chairman; W. A. Clark, S. W. Mehcula, A. R. Cunha, G. H. Vicars, C. K. Stillman, Jr., W. K. Hussey.

PLAINTIFF'S EXHIBIT "E" 525

STATEHOOD FOR HAWAII

HEARINGS

BEFORE THE

SUBCOMMITTEE OF THE COMMITTEE ON THE TERRITORIES HOUSE OF REPRESENTATIVES

SEVENTY-NINTH CONGRESS

SECOND SESSION

PURSUANT TO

H. Res. 236

A RESOLUTION DIRECTING THE COMMITTEE ON THE TERRITORIES TO CONDUCT A STUDY AND INVESTIGATION OF VARIOUS QUESTIONS AND PROBLEMS RELATING TO THE TERRITORIES OF ALASKA AND HAWAII

HONOLULU, January 7, 1946
HONOLULU, January 8, 1946
HONOLULU, January 9, 1946
HONOLULU, January 10, 1946
WAILUKU, MAUI, January 11, 1946
KALAMA, LANAI, MOLOKAI, January 12, 1946
PUUNENE, MAUI, KAU, January 14, 1946
KONAWAENA, HAWAII, January 15, 1946
HAWAII NATIONAL PARK, HAWAII, January 14, 1946
HILO, HAWAII, January 14, 1946
HONOLULU, January 15, 1946
HONOLULU, January 16, 1946
HONOLULU, January 17, 1946
LIHUE, KAUAI, January 18, 1946

Printed for the use of the Committee on the Territories

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WASHINGTON 1946

8.464

a matter of fact, we had a culture test at the university for the freshmen a year ago, and I believe that it showed that we were 1 month behind the mainland in these various tests, which was quite remarkable, as a matter of fact. And I think our teachers' college group was ahead of the mainland norm. It wasn't exactly fair, however, because we didn't have so many men take the test as we did women, and men make the better results on this particular test than the women do, perhaps because mathematics and things of that kind were stressed in that.

Representative ANGELL. In your opinion, how is the general level of education here in the Territory of your students as a whole in the primary schools and on through compare with those on the mainland?

Mr. SINCLAIR. Well, I think they compare very favorably. We have to understand, however, that many of the students in the university are first-generation college students. Many of the students are unfamiliar with those things which we associate with, which we absorb from our parents. When a student asked me, for instance, when I was teaching "Paradise Lost," this question, I was slightly embarrassed. He said, "What is Adam's first name? If I knew that, maybe I would remember him." You know, it never occurred to me that Adam had a first name, you see. Their information goes in other directions from what our culture proceeded.

Representative ANGELL. Numerically, do as many of the children of school age attend school here as in the mainland?

Mr. SINCLAIR. Well, I can't say. I think about 90 percent. On the public schools?

Representative ANGELL. All the schools here.

Mr. SINCLAIR. I think Mr. Long can perhaps answer that better than I can. We have about 20 percent of the senior class. The graduates come to the university. They are very severely screened, however. There is no racial discrimination, but if they don't meet the aptitude tests, and if they are not recommended by their high school tests, and there are three other tests, we don't allow them to come into the university. We don't think that that is advisable.

Representative ANGELL. All the schools are conducted in the English language?

Mr. SINCLAIR. Yes, sir.

Representative ANGELL. There are no foreign language schools?

Mr. SINCLAIR. No, no more.

Representative ANGELL. In your opinion, are the people here from an educational standpoint qualified for the exercise of citizen-ship as a State of the Union?

Mr. SINCLAIR. I believe it absolutely.

Representative MILLER. Doctor, I take it that you subscribe to the theme I have harped on here from time to time that perhaps the future of the United States lies in the Pacific basin as away from the Atlantic seaboard?

Mr. SINCLAIR. I do.

Representative MILLER. And that Hawaii's position puts us in a very strategic, or is a very strategic one for this country in the development economically, socially, and politically within that sphere?

Mr. SINCLAIR. Yes, I subscribe to that wholeheartedly.

In as few words as possible will you state to the committee the present status of those schools and their prospects?

Mr. LONG. By legislative action in 1943, I think it was Act 104, the teaching of any modern language is prohibited in the schools of the Territory, public schools, private schools, all schools, unless the child to be enrolled has attained fourth-year rating, that is, the completion of the fourth year, ready for the fifth year, on standardized tests, with special emphasis on English tests; or the child must have completed eighth grade without such tests. Or, third, he must have attained his fifteenth birthday. No reference to oriental languages, simply modern languages. There is a second important clause to that act, namely, that before anyone can teach a modern language in public or private schools of Hawaii that teacher must be certified, and the certification is to be based primarily upon mastery of English, particularly the English idiom, and in the second place reasonable mastery of the foreign language that is to be taught. In other words, we think that legally the oriental language schools are out of the picture. There is another reason. From the standpoint of public opinion in Hawaii, we believe that they are out, as such. Now there is a strong feeling that just as the high schools, junior high schools and senior high schools of America offer French and German and Spanish, the schools of the southwest, particularly, offer the Spanish language, that we should provide an offering in Chinese and Korean and Japanese for those children who can qualify under the law and who are proficient in speech. I think undoubtedly that the school board in Hawaii will ultimately do that.

Delegate FARRINGTON. In other words, the Japanese language school, as we have known it in the past, is gone, in your opinion?

Mr. LONG. It's gone, undoubtedly, yes.

Representative TAYLOR. Doctor, in line with what you have just been discussing, there has been some reference made by one of the witnesses, and I think his statement has become a part of the record, to the DPI. I assume that means the department of public instruction?

Mr. LONG. The department of public instruction.

Representative TAYLOR. And as the superintendent of public instruction I assume that the DPI comes directly under your supervision?

Mr. LONG. It does; yes.

Representative TAYLOR. And to specifically refer to what I believe to be a serious indictment of DPI [see statement No. 8]. I'll quote you what our record now contains with respect to the question of teaching Americanism. The record will indicate that a statement has been included in our record which says that the DPI has failed to see to it that Americanism has been given top priority over foreign culture, allegiance, and inculcation. And if you would care to, doctor, I'd like to give you the opportunity to refute that statement.

Mr. LONG. Citizenship, loyalty, of course involve information, reasonable background of information, and particularly that intangible something that we call loyalty or sole loyalty. It's psychological. That is the basis in the emotions, it has its basis in the emotions more than it does in the cold intellect. Therefore, it's exceedingly difficult to argue with anyone who makes a statement of that kind. I do wish to make this, or these statements first.

Those of us who have worked closely with these young people in the public schools, in the private schools, in the organized social agen-

test results place Teachers College students on a par with mainland liberal arts college students in general culture background. Their program of teacher preparation emphasizes (a) general education, (b) the practices of American democracy, (c) professional courses in theory and practice, and (d) more emphasis upon English (composition, speech, literature) than any other American teacher training institution. The quality of their service as graduates compares favorably, on any criterion, with graduates of mainland universities and colleges.

5. *Higher education.*—The University of Hawaii is typical of State universities, except for size. It is controlled in the typical American practice by a board of regents. It operates under local legislative appropriations, student fees, and Federal grants in the same manner as do State universities. The University of Hawaii is a member of the Association of American Universities. Its scholarship standards are comparable to other first-class American institutions of higher learning.

6. *Citizenship.*—Public schools and the university have stressed American citizenship in curriculum practices. The results are self-evident. Hawaii's political, professional and business leaders are, in no small percentage, the graduates of our public schools. The inter-racial tolerance so characteristic of Hawaii is, in no small measure, the result of the citizenship emphasis in the public school program. It is no accident that, when American citizens of Japanese ancestry were authorized to volunteer for military service and a quota of 1,500 was allotted, nearly 10,000 volunteered. Less than one-half of 1 percent of the public school enrollment are foreign born.

7. *Language usage.*—Hawaii has a language problem. In this, it is not unique among American communities. Brooklyn has its inimitable jargon, Alabama its delightful inflection, New Mexico its foreign language speaking population. Hawaii, too, has its patois or "pidgin", which while distinctive is becoming more and more English in character. It is not being eradicated, but it is becoming a second language as the quality of English, as such, becomes better. As a matter of fact, there are virtually no citizens of Hawaii who do not use English.

8. *Public education under statehood.*—Statehood will enhance the quality of American public education in Hawaii.

(*a*) The control and support now borne by the people of Hawaii is by virtue of congressional tolerance. Congress could, by amendment of the organic act, take away from the people of Hawaii their control of public education.

(*b*) In general, Hawaii is proud of its achievement in the promotion and development of public education in the American pattern—even by proxy. Under statehood, this pride would be greatly stimulated.

(*c*) Any tendencies toward "educational in-breeding" now existing would be greatly reduced under statehood. There would be greater mobility among teachers. Exchange of teachers would be facilitated. More Hawaiian born students would seek mainland educational experience, and conversely, more students from the mainland would seek education in Hawaii because there would be greater reciprocity possible between Hawaii (as a State) and other States than is now possible between Hawaii (as a Territory) and the 48 States.

(*d*) By providing educational leadership Hawaii can make significant contribution to the dissemination of the democratic way of life throughout the vast Pacific area. It has the experience to draw upon. Such service would be greatly enhanced under the prestige of statehood.

STATEMENT NO. 13

(See p. 303)

PUBLIC SCHOOL EDUCATION IN RELATION OF STATEHOOD

(By Oren E. Long, department of public instruction, Territory of Hawaii)

The United States depends primarily upon one organized instrument to develop an intelligent and informed citizenry. This instrument is the public school.

Support of the public schools in Hawaii has been based on a conviction that the chief function of tax-supported education is to produce good citizens. This means the ability to earn a living; to supply the needs of one's self and of

dependents; to be a good home builder and a good neighbor; to cooperate with others in carrying on the work of all organized agencies, including the various functions of government.

There are evidences that these objectives are being realized in Hawaii to a degree comparable to the success attained in mainland school systems.

In support of this assertion, the following statements are submitted:

1. ORGANIZATION

In organization, the schools of Hawaii are unique in that control is vested in a single school board of eight members, called the commission of public instruction. This board is responsible for all phases of the program of the 184 public schools situated on the seven inhabited islands.

The authority and duties of the school board are set forth in the following quotations from the Revised Laws of Hawaii, 1945:

"SEC. 1701. There shall be an executive department to be known as the department of public instruction. The commissioners, hereafter provided for, shall have full authority and responsibility for the administration of the department of public instruction and all matters pertaining thereto, and shall state the policy or policies of education in the Territory, and fix the curriculum for all the schools under their control. They shall prescribe the duties of the superintendent of public instruction, who shall be administrative officer."

"SEC. 1702. The governor, in the manner prescribed in section 80 of the Organic Act, shall appoint a board of eight commissioners. All commissioners shall have been citizens of the Territory for at least 5 years next preceding their appointment. The commission shall be composed of two appointees who are residents of the county of Hawaii, one of the county of Maui, one of the county of Kauai, two of the city and county of Honolulu and one who shall be appointed at large, who shall be the chairman. Three of the commissioners shall be appointed for a term of 2 years, and four shall be appointed for a period of 4 years. The superintendent of public instruction shall be a member ex-officio on full parity with the other members. Upon the expiration of the terms of the members, their respective successors shall be respectively appointed for a term of 4 years. In case of a vacancy occurring through any cause other than the expiration of the term of office, such vacancy shall be filled by the appointment of a succeeding member for the remainder of the term for which his predecessor was appointed."

"SEC. 1822. The department shall have entire charge and control and be responsible for the conduct of all affairs pertaining to public instruction. The department is authorized to establish and maintain schools for secular instruction at such places and for such terms as in its discretion it may deem advisable and the funds at its disposal may permit. The department shall regulate the course of study to be pursued in all grades of public schools and classify them by such methods as it shall deem proper. Such schools may include normal schools, high schools, kindergarten schools, schools for technical instruction, boarding schools, evening as well as day schools. * * *"

(NOTE.—All laws pertaining to the public schools appear under Title 5: Education, Revised Laws of Hawaii, 1945, pp. 264 to 285. The most important of these laws appears in the "School Code" published in 1945, pp. 5 to 40. A copy of this is shown in "Exhibit 62A".)

2. EQUALITY OF EDUCATIONAL OPPORTUNITY

The centralized control referred to above has enabled Hawaii, more nearly than any one of the 48 States, to attain in actual practice one of the basic considerations in a democracy, namely: Equality of educational opportunity. Children living in rural communities have the same educational opportunities provided for city children. The length of the school year is the same throughout the Territory; certification requirements for teachers are the same; one salary schedule applies to all; expenditures per pupil for educational supply and equipment items are the same; library service is the same; the same emphasis is given to basic subject-matter materials; courses in vocational education are on the same basis; much the same type of instruction is offered in such appreciation subjects as music and elementary art.

During the past decade, new senior high schools have been established in 42 rural communities, thus making it possible for practically all children to attend high school without living away from home or traveling long distances.

This situation does not obtain in the mainland States. All too frequently school boards in cities and in localities where there is a concentration of wealth pay higher salaries than can be paid in rural areas. These more favored communities can attract a disproportionate percentage of superior teachers; they provide more educational supply and equipment items and more school services; their school year is approximately 15 days longer.

President Roosevelt's Advisory Committee on Education, appointed in 1935, issued a report in 1938. They stated that one of the tragic conditions in the present school situation is the contrast between the educational opportunity provided for city youth and for the youth of the rural communities. The following is quoted from that report:

"In general, the least satisfactory schools are found in the rural areas. Although rural schools have improved steadily, there is a wide gap between country and city levels of educational service. Under present conditions, there is no prospect that the rural areas will be able to lessen this gap through their own resources.

"Low school expenditures in rural areas have unfortunate results for the children. Since the teachers are poorly paid, they are frequently untrained and inexperienced. They usually follow textbooks and make little use of supplementary materials to give vitality and interest to their teaching. School terms average a month shorter than in cities. The health, welfare, guidance and other services that school children need in addition to instruction are almost universally lacking."

As has already been stated, this situation does not apply to Hawaii. By and large, the children of the most remote rural communities have educational opportunities comparable to those provided for city children.

3. FINANCIAL SUPPORT

One of the important criteria for measuring sufficiency of a public-school program is adequacy of financial support, particularly in relation to the program of instruction. In this respect, Hawaii ranks high. The latest figures available for the continental United States are for the school year 1941–42 and are contained in United States Office of Education Circular No. 231 (1945). For that year, the average annual salary per teacher in Hawaii (combined rural and urban schools) was approximately the same as that for the average of mainland city school systems and almost twice as much as the average for mainland rural schools.

The average for United States urban schools was $2,013.00; for United States rural schools, $1,012.00;[2] for Hawaii schools, $2,014.00. Only five States—New York, New Jersey, Connecticut, Massachusetts, and California—and the District of Columbia paid an average salary higher than that paid in Hawaii. Since 1942, an increase of $384 in the basic salary and a bonus of $540 per year for each teachers in Hawaii have been granted. Data covering mainland increases are not available here.

On the basis of total cost per pupil, exclusive of capital outlay, Hawaii in 1941–42 slightly exceeded the average for continental United States. The total per pupil cost in Hawaii for the school year ended June 30, 1943, was $114.71. Comparable figures for mainland school systems as of June 1945, are not yet available.

4. CITIZENSHIP AS AN OBJECTIVE

In view of the unusual racial composition of Hawaii's population, the development of sound qualities of citizenship has, for many years, been a primary objective of the public schools.

From the standpoint of imparting information and providing for pupil participation in a wide range of student activities and school organization, there is objective evidence of progress. While it is not so easy to evaluate the more intangible outcomes, such as an understanding of American institutions, the spirit back of these institutions, and a whole-hearted devotion to them—teachers in the schools, social workers in the community and civic leaders generally have strong convictions that unusual progress has been made. Before the war, there was a difference of opinion on this point; but the record of Hawaii's entire population following December 7, 1941, has almost entirely eliminated any honest doubt on this question. The record of Hawaii's young men, who fought on the battle fronts of Europe and of the Pacific area, bear witness to their understanding and devotion.

The following statements in regard to the success of the schools in developing citizenship are significant:

(*a*). In 1941, the Holdover Committee of the Territorial Legislature requested the American Council on Education to sponsor a study of the curriculum of the public schools. The council selected Dr. Edgar M. Draper, Professor of Secondary Education and Curriculum, University of Washington, as director of this survey. In addition to reviewing the situation in relation to the more traditional subject-matter fields, Dr. Draper and his assistants were vitally concerned with the general socialization of Hawaii's school population and evidences of citizenship growth. His report, submitted to the twenty-third biennial session of the legislature in February 1945, opened with the following paragraph:

"The Territory of Hawaii had convincing evidence in the days which followed December 7, 1941, that its educational program had faced a critical test, and that the objectives and ideals of democratic citizenship had become a part of the lives of a people of many races and backgrounds. Every American citizen owes a debt of gratitude to those people in the Territory who had the vision to plan and to develop a democratic school program. Few other communities can boast of having done so much educationally in such a short period of time."

(*b*). In 1937, a Joint Committee on Hawaii, composed of Senators and Representatives of the United States Congress, visited Hawaii to conduct a study of its social, political and economic life. They were keenly interested in the educational program and visited a considerable number of schools while assemblies and classroom work were going on. In commenting on the schools in their written report, they said: "The standards of instruction are the same as on the mainland, being higher than those of many States, and are maintained at the same level in both rural and urban areas." They concluded their comments on education as follows:

"The public schools of Hawaii are the foundation of good citizenship. As a part of their curriculum, they inculcate the basic principles of American democracy in the youth who pass through them. With so many children of alien parentage among them, a definite program of Americanization is necessary. Too much praise cannot be given the schools of Hawaii for the splendid manner in which they have met this problem, and in the great measure of success that has attended their efforts. Through the schools, more than by any other means, the people of Hawaii are being molded together into the American pattern and philosophy of life * * *" (p. 91, Statehood for Hawaii, 78th Congress, Document No. 151).

(*c*) Numerous statements were made following the attack on Pearl Harbor in regard to the morale of the people of Hawaii and the constructive way in which they met the trying situation that developed. These statements are too well known to require repeating. It is felt, however, that the "open letter", issued in January 1942, by Lt. Gen. Delos C. Emmons, United States Army, commanding, should be included in this statement, since it indicates the general quality of citizenship attained by Hawaii's people. (Exhibit 62B.)

As indicated by these statements, there is reliable evidence that desirable qualities of citizenship, in relation to neighborliness, community life and national life, are a characteristic of the people of Hawaii. This development is the joint product of a great many influences, including home, church, industry and organized community agencies. An important influence—possibly the most important influence—has been the organized educational program of Hawaii.

(NOTE.—The extent to which schools participate in meeting community or national needs is the real basis for growth in citizenship. Attitudes and habits of conduct are formed through doing things rather than by studying about things. "Exhibit 62B" gives, in brief, the contribution of Hawaii's schools to the war program.)

5. OVER-ALL PROGRAM OF INSTRUCTION[1]

The public schools of Hawaii provide schooling for all children under a compulsory attendance law that requires boys and girls between the ages of 6 and 16 to be enrolled in regular day schools. In addition to the compulsory attendance period, children are enrolled at the age of 5 in public kindergartens. This program is expanding rapidly and will, within a few years, bring this ser

[1] See Exhibit 62c, a partially completed course of study. Pages 5 to 17a outline briefly the offerings in the fields of social studies—from the kindergarten through the high school. It will be noted that history, geography, health and safety, guidance, and citizenship are stressed. A similar outline of English language development begins on p. 32.

ice to the families in most communities—urban and rural—throughout the Territory.

Also in addition to the compulsory attendance period, the 25 senior high schools of the Territory bring high school graduation within the reach of practically all communities, urban and rural. A very substantial proportion of all students remain in school beyond the compulsory attendance age and complete their high school work. Evening and part-time education for adults, as part of the public-school system, has been made possible by authorization and an appropriation made by the legislature in the spring of 1945. This work with adults is expanding rapidly.

The schools of the territory are, in general, organized as elementary (grades 1 to 6), intermediate (junior high, grades 7 to 9), and senior high (grades 10 to 12). In a number of areas where the population is limited, transportation or other considerations make it advisable that the schools be organized as elementary (grades 1 to 8) and high school (grades 9 to 12).

(a) *Instruction.*—The program of work within the schools is the same as that found in good mainland systems. Emphasis is upon citizenship, and development of the skills and knowledges required for the attainment of fluent English usage. These emphases begin in the kindergarten and are maintained consistently throughout the 13 years to the end of high school.

The 1944 course of study (exhibit 62) outlines classroom work. Primary grade children have informal work in arithmetic and social studies. More formal work in both of these fields begins at the third grade. The social studies are stressed throughout the remaining years of school. The course of study outlines clearly the learnings in history, geography and civics that are planned and presented each school year. Work in arithmetic is carried on steadily from the third grade through the ninth. Many senior high school students also enroll for algebra, geometry and trigonometry, but only 1 year of mathematics is required during the last 3 years. Many schools provide work in music, art, crafts, prevocational agriculture, homemaking and shop.

The war has affected Hawaii's teaching staff just as it has affected the staffs of mainland systems. In a number of schools, it has been necessary to curtail or eliminate some of the courses listed above because of our inability to obtain competent teachers. Now that the war is over, it is expected that all work of this nature will be reestablished and expanded. It is the purpose of the department: (1) That all children shall have some experience in gardening; (2) that all boys shall have work in prevocational agriculture or shop (preferably both); and (3) that all girls shall have courses in prevocational homemaking. Music and art are made part of elementary school work. The quality of this work will improve as teachers, properly trained, return to service or become available for employment. Nearly all secondary schools offer band, orchestra and chorus as electives, and most of them are able to offer art or arteraft courses under competent leadership.

(b) *School services.*—Certain activities of the schools have been called services, but it should be made clear that they are maintained within the schools because of their high educational value. Some of these services are:

(1) Cafeterias: This service not only supplies nutritious, hot luncheons to a high percentage of all school children, but provides a cooperative program of work in which children learn many valuable things related to democratic citizenship. Hawaii's work in this field has been nationally recognized as being superior. (For fuller description, see p. 39, exhibit 62D.)

(2) Dental hygiene: This program, which provides professional care, also gives fine instruction in the hygiene of the mouth and in nutrition. Every child in grades 1 to 4, in both rural and urban schools, is cared for. (See p. 25, exhibit 62D.)

(3) Vision testing: This work is done by teachers in cooperation with the Bureau of Sight Conservation and Work With the Blind. It not only discovers children who need special help, either medical or in the form of glasses, but also helps teachers and pupils to be more sensitive and careful in relation to care of the eyes.

(4) Hearing testing: Special workers on the staff of the Territorial School for Deaf and Blind direct and interpret these tests in all schools of the Territory. The present schedule provides for such tests once every 3 years. War curtailed this work sharply, both through difficulty of travel and loss of trained personnel. It has now been reestablished. This testing program not only discovers pupils who have suffered hearing losses and provides for their proper placement, but

also makes all pupils and teachers conscious of the need for care of the ears and prevention of hearing loss.

(5) Health education: The physical examination of pupils, immunizations and other medical care may be listed as school service. Health education is much broader and enters into the daily work of the classes. Particular attention is given the needs of crippled and handicapped children. (See p. 23, exhibit 6210.)

6. GROWTH IN THE SCHOOL PROGRAM

The program of the schools in Hawaii is not static. There are evidences that growth has been taking place. Among important developments of the past 12 years are the following:

(a) *Establishment of a single salary schedule.*—Under this plan teachers in the lower grades are paid the same as teachers in the secondary grades, provided their preparation and experience are the same. Educationally, this is of great significance, since it encourages good teachers with an aptitude and interest in primary grade education to remain on this level rather than to seek placement in the upper grades because of higher rates of compensation. This law was passed in 1941. This is in keeping with mainland trends: from 1934-44, 57 percent of the communities that made changes in teacher salary schedules adopted the single salary schedule type.

(b) *Exchange of teachers.*—In 1935, a law authorizing the exchange of teachers with other school systems was passed. Between that date and the outbreak of the war, Hawaii sent approximately 300 teachers to mainland school systems and received a like number in return.

(c) *Sabbatical leave.*—In 1935, a plan establishing the privilege of sabbatical leave for all teachers who had completed 7 years' service went into effect. Under this plan, a teacher going on leave receives approximately $90 a month for 12 months. A limited amount of professional training or travel is required.

(d) *Compulsory attendance.*—The age of compulsory attendance has been raised from 14 years to 16 years. (Session Laws of Hawaii, 1937.)

(e) *Kindergartens.*—Kindergartens have recently become a part of the regular public school program. The 1943 session of the legislature provided for the progressive establishment of kindergartens. Additional appropriations for this purpose were made by the 1945 session. The program will be extended until every community in the Territory is served.

(f) *Guidance.*—An occupational information and guidance service was established in 1942 and a pupil guidance division in 1943.

(g) *Adult education.*—Evening classes in vocational education have been offered during a period of 20 years. A program of adult education to include all fields was established in 1945.

(h) *Extension of educational offering.*—In 1935, there were only nine public senior high schools in the Territory. Since that date, 16 have been added. Twelve of these are in rural communities. Children in all parts of the Territory, where there is any considerable number of people, may now attend secondary schools without leaving their home communities.

During this same period, the 9th grade has been added to 30 other schools. The program of vocational training has also been extended, particularly in vocational agriculture and homemaking. A vocational school was also established in Hilo, thus giving each county a vocational school that meets the standards of the George-Deen Act.

(i) *Continuation of the effort to adapt the program to the needs of children and the community.*—This involves a recognition of individual differences and a modification of the program to provide for these differences. Through continuous effort on the part of teachers, progress has been toward this ideal.

7. STATISTICAL TABLES

Significant tables pertaining to the schools of Hawaii are in "Exhibit 12". These contain statements of the cost of education in Hawaii as compared to the costs on the mainland. Enrollment trends over a period of years are also given.

Since there is so much interest in the racial background of the pupils in the public and private schools of Hawaii, special attention is called to Table No. IV, beginning on page 8, which shows that whereas 44.06 percent of all first-grade children in 1934-35 were of Japanese ancestry, the percentage for the school year 1944-45 had fallen to 34.56 percent.

Table No. V, which appears on page 7, shows that out of the total enrollment in the public schools of 81,557 only 190 boys and girls, or 0.23 percent, were foreign born.

8. TOPICS OF SPECIAL INTEREST

There are two topics related to education in Hawaii that are of special interest. These are as follows:

(a) *Oriental language schools.*— At the time of the 1937 statehood hearings, a great deal of attention was given to the oriental language schools, particularly those teaching the Japanese language. All these schools—Chinese, Japanese, Korean—were classed as of December 7, 1941, and were not reopened.

Act 164, passed by the 1943 session of the legislature, was designed to prevent these schools from ever reopening. The following statements are quoted from the Revised Laws of Hawaii, 1945:

"Sec. 1873. Requirements for pupil: No child shall be taught a foreign language in any school unless he shall comply with one of the following requirements: (a) That he shall have passed the fourth grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the department of public instruction attaining a score not lower than normal for his grade; or (b) that he shall have passed the eighth grade in public school or its equivalent; or (c) that he shall have attained the age of 15 years."

"Sec. 1874. Requirements for teacher: No school shall permit the teaching of any foreign language to any child under the age of 15 unless the teacher shall have been examined and certified by a board of examiners of three persons appointed by the commissioners of public instruction to be reasonably well versed in the usage and idiom of both the English language and the foreign language to be taught by such teacher. * * *"

The law is so worded that either public schools or private schools may offer any Oriental language as a modern language. These languages would be offered on the same basis as Spanish, French, German or any other modern language.

It is generally understood that the public schools will offer courses in the Chinese and Japanese language as soon as arrangements can be made and qualified teachers secured. This offering may include Korean, if there is sufficient demand for it. Students will be permitted to select these courses only when they have attained a satisfactory mastery of both oral and written English.

(b) *English-standard schools.*—The establishment of special schools, known as English-standard schools, remains one of the controversial issues in the schools of Hawaii.

These schools were established in 1924 at the request of patrons who did not wish their children's speech to be corrupted by pidgin English. To understand this position, it is necessary to know something about this dialect. The following is quoted from "Hawaii—Off-Shore Territory," by Miss Helen Gay Pratt, published in 1944 by Charles Scribners' Sons:

"'Pidgin' English deserves some description. It has had a long history in the Islands. It developed as a means of communication among people who had no other language in common. It is a language still in common use, so it will be described in the present tense. The street patois of Hawaii is a distinct language by itself. Its vocabulary is almost entirey drawn from the English language, supplemented by the Hawaiian. In its primitive sentence structure, in its lack of verb inflection, and in its omission of articles, it resembles the Japanese language. It is pronounced differently by people of different language backgrounds; for example, the Japanese gives the *r* sound to *l*; the Portuguese the *d* sound to *th*, the *e* sound to short *i*. These defects are, however, interchangeable, and children of any background readily pick up the errors they hear around them. An almost indescribable voice inflection, of Portuguese origin, characterizes the patois, in which pronouns are wrongly stressed. The language makes almost no use of auxiliary verbs; questions, for example, are indicated only by a rising inflection. The vocabulary is inadequate, primitive and sometimes attaches the wrong meanings as, for example, 'I find for him,' which may mean, 'I shall look for him,' or I looked for him,' or 'I am looking for him,' or 'Shall I look for him?'"

This language has a great many variations but, no matter what modifications are made by those who use it, it is wholly inadequate. Its vocabularly is so limited that it cannot be used to express abstract ideas. In no sense can it be called "English."

The dialect or "pidgin" English is basic in the speech problem confronting Hawaii. It has been found that when a great number of children are enrolled in a school, a limited number of whom come from homes where correct speech is used, their influences from the standpoint of speech is not sufficient to neutralize the shortcomings in the speech of others but that, instead, they tend to pick up all sorts of incorrect expressions.

It was to meet this situation that special schools for young children with an English-speaking background were established. It cannot be pointed out too strongly that these schools are not set up on a racial basis. There are a total of eight such schools in the Territory. In some of them, the largest number from any single group are the Hawaiian and Part-Hawaiian. The Chinese have a high percentage in relation to their total enrollment in the schools. The enrollment by groups in the Thomas Jefferson Elementary School (standard) is as follows:

Thomas Jefferson Elementary School

Hawaiian and Part-Hawaiian	170	Korean	4
Portuguese	19	Filipino	8
Spanish	4	All others	36
Other Caucasian	75		
Chinese	48	Total	458
Japanese	94		

The enrollment in the Roosevelt High School (English Standard) is divided as follows:

Hawaiian and Part-Hawaiian	270	Japanese	102
Portuguese	73	Korean	48
Spanish	19	All others	10
Other Caucasian	289		
Chinese	251	Total	1,042

As has already been stated, this is a controversial issue. Everyone in Hawaii, including patrons of these schools, regret the conditions that led to the establishment of these schools 24 years ago. As the quality of speech used in the home improves, it is expected that many children in each regular school will be grouped on the basis of their speech ability. The final step will be the raising of the level of speech of all children so that any speech differentiation among schools or classes in schools will become a thing of the past.

STATEMENT NO. 14

(See p. 320)

STATEMENT OF JOHN H. WILSON, DIRECTOR OF THE DEPARTMENT OF PUBLIC WELFARE OF THE TERRITORY OF HAWAII

JANUARY 9, 1946.

TO: THE CONGRESSIONAL COMMITTEE ON STATEHOOD FOR HAWAII.

As director of the Territorial Department of Public Welfare it is with deep pride that I herewith submit to you gentlemen of the Congressional Committee on Statehood for Hawaii this brief statement of our comprehensive program of public assistance.

"Public welfare" in Hawaii means just that. Every man, woman, or child in this Territory who needs and seeks relief is given assistance by this department. There are no residential tenure requirements. There is no ceiling on the extent of assistance granted to applicants beneath the ceiling of their requirements. And, of course, there is no discrimination as to race, color or creed.

Our Territorial Department of Public Welfare handles all programs in public assistance. Our relief work extends to all shores of the Territory. While most States render relief through municipalities as well as the State, we have in this one department uniform standards and practices.

The department renders:

Old age assistance, aid to the blind, aid to dependent children, child welfare services, general assistance, medical and dental care, hospitalization, and burial services.

mine crime rates on a comparative basis throughout the country. These offenses are murder, manslaughter, rape, robbery, aggravated assault, burglary, larceny, and auto theft. On the basis of figures released by the Federal Bureau of Investigation up to June 30, 1945, it appears that Hawaii stands fairly low in its crime rates for part I offenses. (See table IV of exhibit 64a.)

Also, I should like to point out that the statistics and graphs submitted show that Hawaii's crime rate for part I offenses has not increased in proportion to the increase in its population. This indicates that there is no general crime wave in this Territory, although, as might be expected both from the increase in population and as an aftermath of a great and prolonged war with all of its unfavorable influences, some increase in the actual number of such crimes over the pre-war figures must be expected.

Finally, this data also discloses that the average crime rates for the first half of 1945 are actually lower than those for 1944 in the entire Territory.

I consider these circumstances as indicative of a healthy situation in this Territory.

STATEMENT NO. 16

(See p. 402)

HAWAII'S AMERICANS OF JAPANESE ANCESTRY IN THE ARMED FORCES

(By Lt. Col. Farrant L. Turner, Infantry, National Guard United States (inactive))

This is a brief review of the history and record of the part played in our armed forces during World War II by Hawaii's Americans of Japanese ancestry. While men and women of all races in Hawaii served faithfully and valiantly in many of our far-flung theaters of operation, the Army policy of segregating and organizing units composed of citizens of Japanese ancestry has made it possible to follow their activities particularly. The record thus made available is unique.

With the institution of selective service, citizens of Japanese ancestry were inducted into the Army under local quotas. However, the induction of Japanese Americans under selective service was discontinued after the February 1942 induction and not resumed until April 1944, and from February 1942 until February 1943 Americans of Japanese ancestry were not accepted by the Army even as volunteers.

At the time of Pearl Harbor there were 1,543 Japanese Americans who had been inducted into the Army. At that time there were also a number of Japanese Americans in the Reserve Officers Training Corps unit at the University of Hawaii.

When hostilities commenced on December 7, 1941, the university's Reserve Officer's Training Corps unit formed the nucleus of the Territorial Guard. In addition to the members of that unit, other citizens of Japanese ancestry joined the Territorial Guard. However, on January 19, 1942, the Japanese American members of the Territorial Guard were inactivated, whereupon they, together with other citizens of Japanese ancestry, totaling 169 members, formed a labor battalion and offered their services to the Army. Their offer was accepted and they became officially the Corps of Engineers Auxiliary, attached to the Thirty-fourth Combat Engineers Regiment. They were popularly known as the Varsity Victory Volunteers. These men served in that organization until January 31, 1943, a few days after it had been announced that Americans of Japanese ancestry would be accepted for combat service and a call made for volunteers for such service, to which many of them responded. At the ceremonies at which the group was disbanded, Brig. Gen. Hans Kramer, Hawaiian Department Engineer, stated:

"You men have given substantial evidence of your patriotic willingness to serve. As department engineer under whose direction your work as V. V. V. has been carried out, I can attest to your loyalty and can deservedly commend you for that work. With this sincere commendation go my congratulations and good wishes—and confidence in your performance in a new and greater role as fighting members of the United States Army."

Meanwhile, 1,406 men of Japanese ancestry who had been inducted into the Army from time to time up to February 1942, when their induction ceased, and had been serving with the Two Hundred and Ninety-eighth and Two Hundred and Ninety-ninth Infantry Regiment (the Hawaii National Guard units), were

withdrawn from the National Guard units and sent to the mainland where they were activated as the One Hundredth Infantry Battalion (Sep.).

It was the spirit shown by the members of the Varsity Victory Volunteers and the record in training of the men of the One Hundredth Infantry Battalion, all of whom were of Japanese ancestry, which led to the announcement by the War Department in February 1943 of the reversal of its policy in regard to the enlistment of men of Japanese ancestry and to the issue of a call for volunteers to form a combat team of Japanese Americans. In answer to the call for 1,500 volunteers from Hawaii, a total of 9,507 men came forward to offer their services. Of this number, 2,645 were accepted and sent to the mainland where they were joined by Japanese Americans from the mainland and organized into the Four Hundred and Forty-second Regimental Combat Team, which was composed entirely of Japanese Americans except for a few officers.

Then came calls for volunteers to supply very badly needed language skills for the Military Intelligence Language School. In April 1943, 255 volunteers were enlisted and again in January 1944, 307 more volunteers were taken for this work. In addition to the volunteers for the Four Hundred and Forty-second Combat Team and for service with Military Intelligence, 854 others who were inducted during the period from October 1940 to October 1945 were volunteers. The total number of Americans of Japanese ancestry who were inducted as volunteers was thus 4,061, or 31.3 percent, almost one-third of all Americans of Japanese ancestry who served in the armed forces.

The record of our Japanese Americans in this war is notable even from the standpoint of the number of those who served in the armed forces. The total number of registrants subject to military service in the Territory was 123,000.[1] Those of Japanese ancestry numbered 43,979, aliens and citizens together, or 35.7 percent of the total. However, because of the response to the volunteering program, of the 25,013 servicemen inducted from Hawaii from December 1940 to September 1945, 12,981 were of Japanese ancestry, or 51.9 percent of the total. Of the volunteer enlistments from Hawaii totaling 6,208 up to October 1945, 4,061, as hereinabove stated, or 65.4 percent, almost two-thirds, were of Japanese ancestry. These figures and percentages are particularly significant in the light of the fact that from March 1942 to April 1944, registrants of Japanese ancestry were excluded from selective service calls and that from March 1942 until February 1943 even volunteers were denied enlistment.

Still more impressive than mere numbers is the record of the combat activities of the One Hundredth Battalion and the Four Hundred and Forty-second Combat Team and the achievements of Americans of Japanese ancestry who served in various capacities in many different areas. For bravery under fire and for cool-headed, efficient fighting in critical places, they have won the respect and honor of the American Nation. The One Hundredth Battalion established an enviable reputation as a fighting unit during the early days of the Italian campaign. The Four Hundred and Forty-second Combat Team spearheaded four major Allied offensives, three in Italy and one in France. They rescued the Lost Battalion of the Thirty-sixth Division when it was cut off near Bruyeres, France. Stars and Stripes (European edition) pointed to its unequalled record of decorations received for difficult and dangerous service to their country, listing the following awards:

President unit citations	5	Croix de Guerre (French)	10
Meritorious service plaque	1	Soldiers' Medal (Italian)	3
Distinguished Service Cross	65	Army commendations	50
Silver Star	200	Division commendations	82
Bronze Star	782		

All this was not accomplished without casualties, suffering, and sacrifice. Many a decoration was awarded posthumously, for exceptional bravery in action and devotion to duty above the call of duty. The casualty list of these units include 38 officers and 614 men killed in action. The list of wounded include a large proportion of their members. While not all of those killed or wounded were Americans of Japanese ancestry from Hawaii, they had their full share of casualties.

These services were valuable to the United States and they were appreciated by the men who were responsible for our military operations. Major General

[1] Statistics from Territorial selective service administration as of October 1945.

Dallaquist, commander of the 34th Division in France, said, when awarding one of the decorations mentioned: "We have only the utmost admiration for you and what you have accomplished. No finer fighting, no finer soldierly qualities have ever been witnessed by the United States Army in its long history." General Mark Clark, Lt. Gen. Lucien K. Truscott and other officers who directed the combat services of the Americans of Japanese ancestry in the United States Army have given similar testimony to the value and quality of these services on numerous occasions. Along with many other Americans of many different national origins and racial ancestries, the Americans of Japanese ancestry have proved conclusively their loyalty, devotion and value to the United States.

Among their most significant contributions, Americans of Japanese ancestry served as interpreters, censors, and intelligence workers in the armed forces. Few people in the United States at the outbreak of the war knew the Japanese language well enough to speak the language and read the literature fluently and accurately. Most of those who could were of Japanese ancestry. The work of volunteers for such services, both citizen and alien, in actual combat service and in teaching their knowledge to others in Army and Navy schools, was of the highest value to the United States, and undoubtedly contributed to the saving of thousands of lives of American soldiers, sailors and marines.

Those who oppose statehood for Hawaii because of the presence of Americans of Japanese ancestry would do well to take heed of the words of Lt. Gen. Delos C. Emmons who, in announcing the War Department's plan to induct Americans of Japanese ancestry for combat service in February 1943, predicted:

"The manner of their response and the record these men will establish as fighting soldiers will be one of the best answers to those who question the loyalty of the citizens of Japanese ancestry in Hawaii."

Respectfully submitted.

FARRANT L. TURNER.

JANUARY 15, 1946.

STATEMENT NO. 17

(See p. 403)

STATEMENT OF ROBERT L. SHIVERS, FORMER SPECIAL AGENT IN CHARGE FEDERAL BUREAU OF INVESTIGATION, HONOLULU, T. H., AUGUST 1939–APRIL 1943

COOPERATION OF THE VARIOUS RACIAL GROUPS WITH EACH OTHER AND WITH THE CONSTITUTED AUTHORITIES BEFORE AND AFTER DECEMBER 7, 1941

It was the duty of the Federal Bureau of Investigation to make a thorough appraisal of all the factors which had a bearing on the internal security of these islands. Such an appraisal was instituted immediately upon my arrival in August 1939. A very complex racial situation then existed in Hawaii—one third of the total population being of Japanese extraction, the presence of large groups of people (Filipinos, Koreans, and Chinese) whose homelands had long been or would surely come under the heels of the Japanese Army (as later events proved to be true) in the event of a war in the Pacific, and the undercurrent of suspicion and growing fear of the behavior of the Japanese population in Hawaii. It was readily apparent that unless all the racial groups were held together and worked together as a united community in a common effort, not only would Hawaii's contribution in the event of war be seriously hampered, but it would be most difficult if not impossible to maintain the internal security of these islands and free the Army and Navy for their main task of prosecuting the war against the enemy without the necessity of using a part of their forces in maintaining order behind the lines among the civilian populace. A united front in this complex, cosmopolitan community was vitally necessary for the successful prosecution of the war in this theatre.

Steps were accordingly taken to insure this united front. In some cases, the initiative was taken by my office or by the intelligence offices of the Army and Navy; in other cases, it came voluntarily and spontaneously from the civilians of the community.

A complete survey was made of every phase of life in this community to determine if there were, in fact, any reason for the suspicion which had for years

been directed toward the loyalty of the Japanese population. This survey included the religion, education (the various language schools then in existence), and civic, economic, and social status of all the racial groups. As these surveys progressed, it became increasingly apparent that there was no reason to question the loyalty of the citizens of Japanese ancestry, except for a small number of Kibeis who constituted .345 percent of the citizen population. It was also very clear after these surveys had been completed that a very small percentage of the alien Japanese in the Hawaiian Islands would be actively disloyal to the United States in the event of war between this country and Japan. Steps outlined in this statement were taken for the purpose of conditioning the racial populations for war and for dealing directly with the small disloyal element in the Islands.

To give you some concrete evidence of the size of the disloyal group in Hawaii, I would like to point out that from December 7, 1941, to the end of hostilities, there were only 1,440 persons of Japanese ancestry who were picked up for internment, or .9 percent of the total alien and citizen population of Japanese ancestry. This group may be further broken down to show that of the total interned, 879 were Japanese aliens. The total number of Japanese aliens who were picked up for internment was 879, and of that number, 301 were subsequently released or paroled after being brought before the internee hearing boards. There was a total of 534 American citizens of Japanese ancestry picked up for internment, and of that number, 160 were released or paroled after they had been given a hearing before the internee hearing board. In the citizen group there were 468 Kibeis. There were 28 expatriated citizens of Japanese ancestry who were also interned. This means that there were 881 citizen and alien Japanese who were actually interned and sent to war relocation camps on the mainland. You will better understand the significance of these figures if you know that at the time of Pearl Harbor there were approximately 120,000 citizens of Japanese ancestry in the Hawaiian Islands and 40,000 aliens. I do not intend to try to create the impression that the intelligence agencies picked up all of the disloyal subjects of the Japanese empire, or for that matter, all of the disloyal citizens of Japanese ancestry, but it is my purpose to show that the overwhelming majority of the citizen group was loyal to the United States and that if there were any disloyalty among the alien Japanese who remained at large, that disloyalty was never translated into action against the United States.

It would be impossible to describe in detail every step that was taken before and after December 7, 1941, but the following will give some idea of the plans which were laid before that date and the implementation of those plans during the entire period of the war. It is my hope that, among other things, this brief description will serve to show:

1. The cooperation and assistance given the constituted authorities by the civilian populace of all races in preparing the community for the exigenc of war and in maintaining a united effort during the war toward a commo goal.

2. The active cooperation between the races, particularly among their leaders, and the lack of any serious open friction between the racial groups during the war—a fact which augurs well for the future welfare of this Territory or State.

3. The cooperation of the Japanese group and the valuable assistance given by certain members of this group, not only to the F. B. I., but to the intelligence services of both the Army and Navy. An accurate appraisal of the situation, insofar as this group was concerned, would have been impossible without their cooperation. Certain projects initiated and carried out by the Army (e. g., the recruiting drives for interpreters, the call for volunteers for the 442nd Combat Team in February and March of 1943) would also have been impossible without the active and valuable assistance which came from the leaders among this group.

ORGANIZATION OF GROUPS AND OTHER STEPS TAKEN PRIOR TO DECEMBER 7, 1941

1. *Advisory Groups Composed of Americans of Japanese Ancestry.*—Two of these groups were organized between April and June 1940. The personnel of these groups was carefully selected on the advice of men of non-Japanese ancestry who knew them personally and who also knew the Japanese community rather intimately through long years of study and direct contact with its members. It

consisted of men drawn from various walks of life, men of intelligence and ability whose loyalty to the United States was unquestioned. These groups met separately with me and with one of my agents to discuss and appraise all aspects of the Japanese community which might have anything to do with the maintenance of internal security and the probable behavior of this particular racial component in the event of war with Japan. Meetings were held at least once a week, sometimes oftener. The information which we were able to secure from these men through their keen insight into the psychology of the Japanese people in Hawaii and their accurate and wide knowledge of what went on among them helped immeasurably in our appraisal of the situation and in taking the necessary preparatory steps prior to Pearl Harbor.

These groups also helped to lay definite plans aimed toward the control of any subversive elements among their segment of the population. Some of these plans were placed in operation months before Pearl Harbor; the rest were either absorbed and implemented by other groups which were later organized, or found to be unnecessary or impracticable by the events which followed the outbreak of war.

2. *Oahu Citizens Committee for Home Defense.*—This was an outgrowth of the plans laid by one of the advisory groups mentioned above and embraced a wider range of the trusted leadership among the Americans of Japanese ancestry. The Committee was formally organized early in 1941. Among its purposes were the following:

(*a*) To work with the constituted authorities in the continuing task of evaluating what went on in the Japanese community.

(*b*) To plan for and carry out the task of bringing out more positively the inherent loyalty of the Americans of Japanese ancestry toward the United States.

(*c*) To prepare the Japanese community psychologically to their responsibilities toward this country in the event of war and for the difficult position in which the war would place them in their relationship with the rest of the general community.

One of the first and outstanding achievements of this committee was the sponsorship of a patriotic rally in June 1941. Some 2,000 citizens and aliens of Japanese ancestry in addition to about 200 invited guests of other races, filled the McKinley High School auditorium on the night of June 13, 1941, to hear Col. (now Brig. Gen.) M. W. Marston, then Assistant Chief of Staff for Military Intelligence, Hawaiian Department, U. S. Army, deliver a message on behalf of Lt. Gen. Walter C. Short, the then Commanding General of the Hawaiian Department, in which he enunciated publicly for the first time the official attitude of the U. S. Army toward those of Japanese ancestry, both citizens and aliens, in the event of war, and urged the people of all races to place their trust in the constituted authorities and refrain from any acts which might disrupt a united citizenry and place the Army in the position of having to enforce peace and order in the civilian community. He promised just treatment for all citizens, regardless of racial ancestry; swift and severe punishment for any and all whose acts are detrimental to the welfare of the United States; and fair treatment to the aliens of Japanese ancestry in the event of war so long as they conducted themselves in a manner uninimical to the United States. This meeting helped immeasurably to allay much of the fear and insecurity which were then developing in this community as the war clouds gathered more ominously over the Pacific. It also provided some definite and clear-cut criteria to guide the behavior of the Japanese as well as the rest of the community in the event of war.

3. *Committee for Interracial Unity in Hawaii.*—The seeds for this group were sown as early as December 1940, almost exactly a year before Pearl Harbor, at a meeting called significantly enough by an American of Chinese ancestry at a time when the Sino-Japanese war was at its height. Present were representatives of most of the racial groups in Hawaii—Chinese, Japanese, Caucasian, and Hawaiian. The group met to consider ways and means of combatting the growing resentment of certain of the racial groups against those of Japanese ancestry which resulted from the aggressions of the Japanese Government and its various moves leading toward a general Pacific war. It was, however, fundamentally interested in the preservation of Hawaii's traditional pattern of race relationships, knowing full well that a war between Japan and the United States would place a severe strain on the racial harmony that was part of Hawaii and that unless something was done to prepare for the war which seemed inevitable, that pattern might be seriously disrupted.

Several subsequent meetings were held to consider the problem and to secure the active participation of as many as possible of the key leaders, both civilian and military, in the community. Following these preliminary organizational meetings, a steering committee was set up to carry on a quiet but aggressive program with the aid of a larger advisory committee which included representatives from every major racial group in Hawaii. The steering committee itself was inter-racial in character. It also included many of the key civilian leaders, both business and professional, and the heads of the Army and Navy Intelligence Services as well as the head of the local office of the F. B. I. who was selected to be its chairman.

Space does not permit a detailed description of the biweekly meetings held by this group and the many ways in which it helped to prepare the way for what followed in this community when the war finally came. The following aims, however, quoted from its report, guided its work and will give some idea of its scope and functions:

"(1) It is interested not only in the immediate problem of national defense as far as these islands are concerned, but also in the way the people of Hawaii are going to live together after the emergency is over. The latter is based on the assumption that if the people here of various races can continue to live together harmoniously during the emergency, trust each other, and cooperate even more closely than they have in the past, then a basis for a still better human relationship will have been established for the future. The contrary will be equally true.

"(2) As far as the immediate present is concerned, unity of purpose and action is absolutely necessary for a strong national defense. We cannot afford to have a divided citizenry—one race set against another or one class against another. The people of Japanese ancestry, both citizens and aliens, compose about one-third of our population. Accepted and united in purpose and action, they are an asset to the community. Rejected and treated as potential enemies, they are a burden, even a danger, to our security.

"To achieve this unity and to preserve the relatively fine human relationship which has so far prevailed in Hawaii, the people must—

"(1) Feel that Hawaii has something unique and worth while to preserve in the way of human relationships.

"(2) Accept the idea that a united citizenry is essential to our defense.

"(3) Have faith in the American way of life and be willing to protect it.

"(4) Place absolute reliance on our constituted authorities, confident that they will treat everyone with equal fairness and see to it that he is so treated by his fellow citizens, and that anyone acting in any way inimical to the general welfare will be promptly and severely dealt with. There is no need for and there must not be any vigilantism on the part of any group.

"(5) Overcome fear—fear on the part of the nationals of those countries with which we might become involved in a war that they will be mistreated and persecuted, and fear on the part of the rest of the people that these particular aliens might actively assist our enemies.

"(6) Develop a sense of personal responsibility to do everything possible to make Hawaii and the entire Nation strong militarily and otherwise. This includes the aliens who must accept the fact that they owe a certain obligation to the land in which they are now living and that they will be protected and allowed to enjoy all normal privileges only as long as they obey our laws and conduct themselves constructively.

"(7) Be willing to give every loyal citizen, regardless of race, a place in the scheme of national defense. No group should be denied the opportunity to do its share merely because of racial considerations.

"(8) Remember that loyalty grows only when it is given a chance to grow. It does not flourish in an atmosphere of suspicion, discrimination, and denial of opportunities to practice that loyalty."

Among the most important phases of its work were the meetings of various racial groups, particularly the Filipinos, called and addressed by Col. (now Brig. Gen.) Kendall J. Fielder who succeeded Colonel Marston as the Assistant Chief of Staff for Military Intelligence and who is still head of the Army G–2 in this theater, and by myself as head of the FBI. The Filipinos were of special concern to the group because of their impulsive characteristics and because it was obvious that their homeland would be one of the first places to be invaded by the Japanese Army. The Japanese aliens were also an important group not only because of their large number but because under control and, better still, with

their active cooperation, they could become a real asset to our war effort. The point stressed to them was the one already enunciated by the Army, namely, that so long as they conducted themselves in accord with law and did nothing detrimental to this country, they would be treated fairly and given every protection of the law. Civic and business groups were also addressed by Colonel Fielder, Colonel Marston, and myself in our respective official capacities, and by certain lay members of the committee who also talked to groups of mainland defense workers who were beginning to come to Hawaii in larger numbers.

Many governmental (including the Governor of the Territory and the Mayor of the city and county of Honolulu), civic, business, and racial leaders were also contacted by members of the committee.

These informal contacts and the meetings which were held throughout the Territory and which, in many instances, were publicized in the English and foreign language papers to insure adequate coverge, contributed much toward conditioning the civilian populace toward the idea of working together in the event of war and trusting the constituted authorities to handle the task of dealing with any subversive groups.

4. *Cooperation of individual members of all races.*—Aside from the groups mentioned above, the FBI received willing and valuable assistance from men and women of all races. Many of these people were concerned not only with the preservation of internal security in the event of war; they were genuinely interested in the American principle of fair play, wanted to see every racial group given the opportunity to contribute its just share toward the war effort and to preserve the Hawaiian way of racial harmony and cooperation.

I think the broad conclusion can truthfully be drawn that the people of Hawaii were conditioned for war by the long history of race harmony and cooperation, even more than by the special methods used just before and after the outbreak of the war. And I believe the behavior of the population and its magnificent contribution to the war effort fully justify this statement.

ORGANIZATION OF GROUPS AND OTHER STEPS TAKEN SUBSEQUENT TO DECEMBER 7, 1941

1. *Cooperation on December 7 and during the critical days which followed.*—Many of the individuals associated with the various groups mentioned in the foregoing section reported of their own accord to my office on the morning of December 7 to offer their assistance in putting into operation the plans they had helped to evolve during the months preceding the outbreak of hostilities.

2. *The Morale Section of the Military Governor's Office.*—This was the direct outgrowth of the preparatory work carried on by the Committee on Inter-racial Unity. Representatives of this committee called on me and on Colonel Fielder soon after the Japanese attack on Hawaii to offer their services in implementing the plans made prior to the attack. They also discussed their plans with the heads of the local Office of Civilian Defense. As a result of these meetings, a Morale Section was created in the Office of Civilian Defense on December 18, 1941. This later became the Morale Section of the Office of Military Governor on January 26, 1942.

Appointed to the Morale Section were a Caucasian (Charles F. Loomis), a Chinese (Hung Wai Ching), and a Japanese (Shigeo Yoshida)—all American citizens, of course. All three had been very active on the Committee on Inter-racial Unity and on other similar committees which functioned prior to Pearl Harbor.

To tell adequately the story of the Morale Section and its affiliated groups would take more space than is available here. Briefly, however:

1. It was appointed by the Army and worked under the immediate supervision of the Assistant Chief of Staff for Military Intelligence.

2. It maintained a close liaison with the FBI and the Military Governor's Office.

3. It naturally worked in close cooperation with and oftentimes through the civilian leaders and organizations in the community.

4. Its membership was interracial and it had an interracial advisory group which it consulted from time to time.

5. Its primary purposes were to (*a*) serve as a liaison between the Army and the civilian community on matters relating to public morale; (*b*) work toward the maintenance of a unified and cooperative community.

6. To carry on its work, it organized several racial subcommittees to work among their respective peoples. These subcommittees assisted in keeping their

people informed of Army orders affecting the civilian community, strove to maintain a maximum war effort, assisted in preventing racial feelings from becoming aggravated, and in general contributed much toward maintaining a sense of unity among the various racial groups in the community. In the case of the Japanese subcommittee (known as the Emergency Service Committee) similar groups were organized on each of the other islands and, in addition to the work common to the other racial subcommittees, did much to assist the Army in all its recruiting drives for interpreters and to bring out positively and aggressively the inherent loyalty of the Americans of Japanese ancestry in Hawaii as well as to keep the aliens on our side.

7. Through its affiliated committees and through the channels it had open to it among various segments of the community as well as the Army, it contributed a great deal toward maintaining the united front which I believe was most essential to our war effort in Hawaii and of which the people of Hawaii can be justly proud.

3. *The emergency service committee.*—This was one of the racial subcommittees organized by the Morale Section. It is included here for special mention because it was the group which spoke for and worked among the Japanese and because its work has been so outstanding. Its purposes as outlined in their progress report of March 25, 1944, were as follows:

"(*a*) To carry on a program of education which will strengthen the loyalty to America of both the citizens and aliens of Japanese ancestry.

"(*b*) To help them demonstrate their loyalty in concrete ways to speed the defeat of Japan and all other enemies.

"(*c*) To help them face realistically and cooperatively the difficult situation in which the war has placed them.

"(*d*) To cooperate with the authorities in meeting the many problems which affect the security of the islands and the welfare of all the people.

"(*e*) To work for the application of the fundamental values of American democracy in the treatment of all Americans, regardless of racial ancestry, fully realizing that military and other requirements sometimes make impossible the full application of this principle.

"(*f*) To meet, in cooperation with the Army, the Red Cross and other local, Federal and Territorial agencies, certain morale and personal needs of our boys in the service and of their families at home.

"(*g*) To organize and carry out, again in cooperation with other established agencies, definite plans for the rehabilitation of our returning disabled soldiers and for the solution of the many complex postwar problems of reemployment and readjustment.

"(*h*) To work with the leaders and organizations of other racial groups for the preservation of Hawaii's traditional harmony among all races and the promotion of a united home front."

Its accomplishments are too numerous to mention. Suffice to say that its influence was positively American, its work appreciated by the community, the Army and the FBI and its contribution toward the maintenance of interracial unity in Hawaii during the critical years of the war outstanding. A copy of their report is attached herewith.

4. *The Honolulu police contact group.*—This was a group similar in many respects, certainly in its major purposes, to the Emergency Service Committee except that it was sponsored by the Honolulu Police department under the able aggressive leadership of one of its officers, Capt. Anthony Burns, who for many months headed its espionage division which worked under the direction of the FBI. Its work was largely among the Japanese people of Oahu. Preparatory plans for it were laid long before Pearl Harbor but its actual organization was delayed until some weeks after Pearl Harbor. It, too, helped to allay the fears of the alien Japanese and to channel their efforts toward an American victory, as well as to encourage active participation of the Americans of Japanese ancestry in the war effort. Indirectly, it also helped to allay the fears of the other racial groups where the Japanese were concerned, thus contributing to the over-all unity of this community.

5. *The Citizens' Council and other groups organized to promote unity.*—The Citizens' Council was composed of many of our leading professional and business leaders. Among its aims was to keep this community united in purpose and action. It, together with other more informal groups, sprang up spontaneously throughout the Territory, particularly in Honolulu, and did much to avert frictions and tensions in the Territory's polyracial communities.

SABOTAGE AND FIFTH-COLUMN ACTIVITIES

There was not one single act of sabotage committed against the war effort in the Hawaiian Islands during the course of the entire war. Nor was there any fifth-column activity in existence or in evidence here. As a result of disclosures before the committee now investigating the Pearl Harbor disaster that fifth-column activity was present in Hawaii during the early days of the war, I made a statement to the press on December 31, 1945, as follows:

"In spite of what Admiral Kimmel or anyone else may have said about the fifth-column activity in Hawaii, I want to emphasize that there was no such activity in Hawaii before, during, or after the attack on Pearl Harbor. Consequently there was no confusion in Hawaii as a result of fifth-column activities.

"I was in a position to know this fact, and I speak with authority when I say that the confusion in Hawaii was in the minds of the confused, and not because of fifth-column activities.

"It was not the civilian population who was confused. Nowhere under the sun could there have been a more intelligent response to the needs of the hour than was given by the entire population of these islands.

"As a matter of fact, had it not been for the lack of hysteria in the civilian community and the orderly manner in which they responded as a result of the preparation the civilian community had made for war, especially the doctors, the law-enforcement agencies, and the office for civilian defense, there would have been confusion with which the community would not have been able to cope.

"The civilians in this community have never received the praise to which they are justly entitled for their contribution to the armed forces on that day and in the years following.

"It is high time that the people of the United States should be told of Hawaii's contribution to this war, which is unequalled in the annals of our country."

I am sure you gentlemen have heard the 101 rumors that have been spread throughout this Territory and the mainland United States since the day of the attack. One of these stories was to the effect that some of the Japanese aviators who were shot down over Oahu that morning were wearing class rings of McKinley High School. Another was that arrows had been cut in the canefields by the Japanese population which pointed toward Pearl Harbor and guided the attacking force to their targets. Another was that a transmitter had been discovered in the possession of some Japanese who were transmitting information to the enemy. Another was that the sides of a milk truck at Schofield Barracks suddenly collapsed and machine guns manned by Japanese opened fire on the soldiers at that post. There were many more rumors with which you are familiar. There was not an iota of truth in any of them. During the whole course of the war not one single transmitter was discovered on the Hawaiian Islands which was being used to disseminate information to the enemy and at no time was there any radio interference with our own communications because of jamming or transmission from unknown stations in the Hawaiian Islands.

No amount of repetition before the investigating committee will alter the fact that sabotage and fifth-column activity was never engaged in at any time prior, during, or subsequent to the attack on Pearl Harbor.

SOME GENERAL CONCLUSIONS

This brief statement does not cover adequately the story of Hawaii's interracial cooperation before and during the war and the cooperation of the various racial groups with the armed services and other governmental agencies whose primary concern was the protection of internal security and the vigorous prosecution of the war. It certainly does not do justice to all the individuals and groups concerned, particularly to those whose names are not mentioned either because they are unknown to me or because space does not permit the mention of every name involved. It does, however, show that:

1. Hawaii's people of various racial ancestries can and do work together, particularly in the face of a major crisis.

2. What goes on in the countries of their ancestors is of minor concern to them as compared to what goes on in their own country, the United States of America. The latter is their major concern as Americans.

3. Hawaii's people of all racial ancestries did cooperate with the constituted authorities in preparing for and in prosecuting the war against Japan.

4. This community, despite its polyracial composition, is essentially American in though, purpose, and action.

5. The united effort of the civilian community during the war was the result, at least in part, of the preparations made jointly by the civilian and official leaders before the war.

6. If the actions of the people of Hawaii before and during the war is any criterion, they can be expected to work together in the future toward a common goal.

STATEMENT NO. 18

(See p. 405)

STATEMENT OF HAROLD W. BOSS, DIRECTOR OF CIVIL SERVICE AND PERSONNEL CLASSIFICATION, TERRITORY OF HAWAII, JANUARY 15, 1946

A STATEMENT ON THE OPERATION OF CIVIL SERVICE AND CLASSIFICATION IN THE TERRITORY OF HAWAII TO BE ENTERED IN THE RECORD OF THE HEARING ON STATEHOOD FOR THE TERRITORY OF HAWAII

This statement was prepared upon request of the committee by Harold W. Boss, director of the civil service and personnel classification of the Territory of Hawaii.

The forerunner of civil service in the Territory of Hawaii was the civil-service system provided by the territorial legislature for the board of health in the year 1913. From that time forward there were many proponents of a Territorywide system of governmental employment.

In 1939, after an exhaustive community study by business and governmental leaders, it was proposed by the then governor that a system of civil service and classifications be adopted. The bill proposing civil service, which provided a personnel system based on merit principle and scientific methods, whereby a fair and equal opportunity for public service was guaranted all citizens, and which would assure government employees of character and capacity jobs of a permanent nature and to improve the efficiency of the government by the improvement methods of the personnel administration, was adopted.

During the next 2 years after this bill became law, the Territory operated without benefit of a classification system; however, in 1941 at the special session of the territorial legislature, the Classification Act was approved, effective with November 1, 1941.

Civil service and classification proceeded to enhance the condition of government employment. From that time forward all employment with the Territory (as with the counties, but under each county's jurisdiction) government employment has proceeded as an orderly progressive function. All positions with the Territorial Government are benefited by the known advantages of the merit principle of employment and equity of classification wherein equal pay for equal work is provided.

This advanced method of governmental function which is identical to that of cities, counties and States of the mainland United States, as well as the Federal Government, has been in successful operation in the Territory for over 6 years. The operation of civil service and classification in the Territory compares very favorably with mainland governmental functions of this nature and in some instances it can with all modesty be stated that this function in the Territory is superior to that of certain mainland localities.

It has been my privilege to personally visit many civil-service jurisdictions of the United States as well as Canada and to have particularly scrutinized this function at the State and Federal level. As a result of these intimate comparisons I can satisfactorily justify our "State" level of operation in the Territory. Such survey trips for the purpose of maintaining our governmental employment at an efficient level are made periodically.

It should be of interest and value to your committee to know that the Territory has over 640 classes of positions falling within the professional and scientific; clerical, administrative, and fiscal; subprofessional; crafts and custodial; and the inspectional and investigational service. For your information a schematic list of our classified positons is attached to this statement.

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PLAINTIFF'S EXHIBIT "F"

STATEHOOD FOR HAWAII

HAWAIIAN EQUAL RIGHTS COMMISSION
HONOLULU

HEARINGS

BEFORE THE

JOINT COMMITTEE ON HAWAII CONGRESS OF THE UNITED STATES

SEVENTY-FIFTH CONGRESS

SECOND SESSION

PURSUANT TO

S. Con. Res. 18

A CONCURRENT RESOLUTION RELATIVE TO A STUDY OF THE SUBJECT OF STATEHOOD AND OF OTHER SUBJECTS RELATING TO THE WELFARE OF THE TERRITORY OF HAWAII

OCTOBER 6 TO 22, 1937

Printed for the use of the Joint Committee on Hawaii

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1938

Q. Your staff, then, does not have on the staff, or associated with it, anyone who reads and passes on the textbooks used in the Japanese language schools?—A. At the present time, no. We have in the past had an Oriental language division, until the time the law was declared to be unconstitutional. Following that we retained the services of the secretary of that division until some 3 years ago when she resigned because of matrimony. She was a very thorough student of Japanese. We have translations of their books, made by her, as well as others. I turned over to the committee 2 years ago translations of the books used. Those are still available, I believe.

Q. The staff does not attempt in any way to prescribe courses to be taught in the Japanese language schools, or attempt to regulate what is taught in the Japanese language schools?—A. We are interested, and we know the books, but my answer is "no." We have no member of our staff to whom is assigned that obligation.

Q. Then I would like to ask you if in your schools you experience any difficulty with children who attend the language schools, which makes them more difficult to instruct than those children who
713 do not attend the language school?—A. That is a difficult question. There is a difference of opinion. Two studies have been made on it. We have the study made by Dr. P. M. Symonds, now professor of education at Columbia University, formerly employed on the staff of the University of Hawaii. He used two very carefully controlled groups of Chinese rather than Japanese because at that time almost 100 percent of the Japanese children attended the language schools, so that he could not get 2,500 or 3,000 average students who had not at some time been exposed to the influence of the Japanese language school. His studies centered around the Chinese, where the problem is much the same. His conclusion was published and available to the committee.[1] He found, so far as the language school is concerned, that there was apparently no effect on the English problem in the public schools. The idea is held, even among teachers, that it does add to the language problem. There was one other study made, perhaps not quite so authentic as the one by Dr. Symonds, where the conclusion is the same, that there is no particular correlation.

Q. Do you think that the attendance at the Japanese language schools by these children makes it more difficult for them to reach the complete realization of American institutions? Do you think the language schools interfere with their reaching complete realiza-
714 tion of American institutions, Mr. Long?—A. I am a little inclined to say yes, that I feel that way, and yet the evidence—if anyone were to ask me for evidence of it, I could not give. There isn't anything in my experience that convinces me of that. I have observed this, that people in America, those who are well situated economically, covet for their children the mastery of more than one language. Now when we talk about culture, we must not forget that the biggest thing in a culture is its language. I don't want to go on record as saying that the study of a second or third language is detrimental to good citizenship. It is not a question in the study of French. I am not familiar with any body of people who question it.

[1] Journal of Applied Psychology, vol. VIII, No. 4, p. 411, December 1924.

Q. But you will concede it is rather difficult to find a situation of school instruction of a foreign language that is analagous to this situation in Hawaii?—A. It is, and that is why I hesitate to say no. I would say, in Oklahoma City, where little children are started in the lower grades in French, that it was not, but I am aware that conditions here are different. The study of the fundamental facts underlying the work of creating good citizens immediately gets us into a situation where only time will tell.

Representative SNELL. Do you agree with the witness who addressed us yesterday, I believe it was Dr. Stokes, who said that the teaching of Japanese culture was largely the teaching of the Japanese spirit and nationalism?

715 The WITNESS. I do not. I do not agree with that.

By the CHAIRMAN:

Q. Taking a dozen of your students, or those who have come under your influence and instruction, who have attended the Japanese language schools, and a dozen who have not attended the Japanese language schools, do you see any difference in their scholastic attainments, or the rapidity with which they assimilate information given them by their teachers?—A. My impression is that there is no difference. My objection to attendance at the Japanese language school—I do have one definite objection to argue against it—is the length of the school day. Ordinarily when a child comes to school in Utah, Kansas, Iowa, or California, and remains through the prescribed number of hours; we think of that as a school day, and I am not satisfied with a set-up which will take a fairly high percentage of the pupils of the public school and put them in a second school. It is an anticlimax, and I know that many of the children feel that it is an anticlimax.

Q. Does it ever exceed an hour?—A. Possibly in some instances, but not to my knowledge.

Q. We visited McKinley High School the other day, as you know, and other schools, where there were many Japanese students, students of Japanese ancestry. Had those Japanese boys and girls attended the Japanese language school?—A. My guess would be that every Japanese boy or girl who spoke had attended the Japanese lan-
716 guage school. Almost 100 percent are sent to the Japanese language schools. They go to the public school, and are sent to the Japanese and Chinese language schools.

Q. By and large do you find that the knowledge of the Japanese language, imperfect though it may be, obtained during that one hour of schooling in the Japanese language school, interferes in any way with their progress and instruction in the public schools?—A. I feel it does not. The pidgin English, which they resort to on the street, playground, and parks does interfere. We have to break that down, but the studies made, that I referred to, seem to indicate that there is no particular basis for feeling it compromises their ability or lowers their scholastic efforts.

Q. I dislike to institute a comparison between races, but these students who attend the 1-hour school, and those who do not, the Portuguese, Chinese, Anglo-Saxon, do you find any difference in the manner in which they absorb instruction or culture or react to the

institutions of our Government?—A. I don't think there is any difference. They are just a group of American high school students. Of course they have their national traits. I do not mean to say that I think a typical Frenchman is not a little more emotional in his reactions than a phlegmatic German. There is a certain reticence on the part of the Japanese as compared for instance with the people of Spanish or Portuguese background. We recognize those differences, but the differences to be found in a school set-up are negligible.

717 Q. You recognize the difference between the stolid Englishman and the rather effervescent Frenchman?—A. Yes.

By Representative FULLER:

Q. When the children of the second generation Japanese or Chinese first enter school, do they speak the English language, or the Japanese and Chinese language?—A. A great many in past years have come to us with—I think it would be fair to say with Japanese as their mother tongue.

Q. And the second generation?—A. Not many of the second generation.

Q. That is what I am talking about.—A. Now the quality of the English spoken varies greatly, just as it does in the New York East Side district, and certain sections of Boston.

Q. As I understand it, these Japanese are first generation, and the first generation have children now attending school?—A. Yes.

Q. Do you find that there is a difference in the first and second generation children attending school, as to the quality of English they speak?—A. Yes; there is a difference. Their language is improving all the time. There is still a problem in the matter of speech, but we do not accept the statement that it is our greatest problem. I think the building of character, and the right attitude, is the greatest problem.

718 Q. Is there an improvement?—A. Yes, there is; very decidedly.

Q. In other words—oh, by the way, in your department's supervision of the language schools, do you ever seek to ascertain whether or not they are teaching anything in the language schools which is incompatible with the American institutions of our Government?—A. We are interested in that in a very large measure, and from conversations with students about their schools, we have a basis for a conviction that while that might occur, as has been claimed by others, in individual instances, it seems to me it would be unreasonable to think that, by and large, that condition exists. I feel confident that the real purpose of the language schools is to teach the language—Japanese, Chinese, or Korean as the case may be—and I am told it is very imperfectly and poorly done. I recall that some years ago a Japanese student training ship came into Hawaiian waters. Wallace Rider Farrington was Governor, and he told me this story of a conversation he had with the commanding officer. At the dinner table the problem of education was discussed, and Governor Farrington asked the visiting admiral as to the quality of the Japanese taught in the language schools. The Governor was very much amused by the effort of this high-ranking officer to be polite and at the same time honest. He shook his head and said, "It is not much."

Q. In the 20 years of your experience as a teacher, and closely connected with the schools of the Territory, do you find con-
719 ditions among those who have attended these language schools that would lead you to believe they had been taught things that were intended to make them loyal to the Japanese Government or disloyal to the American Government?—A. Not at all. If they were teaching things like that it would naturally be done under cover, but, contacting as many children as we do, we would certainly have opportunity to learn of it.

Q. In their teaching of the younger children who have not reached the age of discretion, do you think such teachings would show themselves as the children grew older, if they really were teaching anything incompatible with the accepted American institutions?—A. I believe firmly that it would come out sooner or later. I would like to mention an incident that occurred some years ago. One or more Japanese training ships came to Hawaii—just as our ships go to Europe. They were anchored in the channel off Lahaina, Maui. At that time Benjamin O. Wist, now dean of teachers' college, University of Hawaii, was principal of the Lahaina Grammer School. The children in the lower grades were asked to draw the ships in the harbor, and Dr. Wist says when they drew the ships and it came to the question of putting on a flag, all but one or two used the American flag. I think that is typical of what is taking place. They have come to think of this as America, just as I thought it America as a school boy in Kansas, except that they likely give more thought to it. I really never thought of it; I took it for granted. They are more aware of it.

720 Q. Has your experience taught you that in debates any of these Japanese or Chinese ever argues the superiority of the native government to the United States?—A. I am not aware of that. I can think of it as being possible in any racial group.

Q. In your opinion, is this second and third generation of oriental children loyal to the American Government?—A. I think they are. I feel they are absolutely loyal, as other people have been loyal. I must say that if we should have an international war I think many of these young men of even the second generation would have an awful ordeal. Other peoples have had it. English, German, and so forth. I would repeat what I said at the beginning, that they are overwhelmingly loyal. I think we would all be surprised as to the extent of that loyalty.

Q. If you do not mind answering this question, I would like to ask you whether or not, in your opinion, objections to statehood for the Territory are not due so much to the fear of disloyalty on the part of the oriental people, particularly the Japanese people, but more to the fact that if it were made a State that after a few years the Japanese would predominate and elect the Governor, Senator, and Representatives?—A. I do not mind answering that question. I think that is another way of asking whether the objection to statehood is not based in part on racial prejudice, is it not?

721 Q. It is.—A. I think that part of the opposition is due to prejudice in the minds of the people who oppose it. Some of the people who oppose statehood are my very good friends, and we

PLAINTIFF'S EXHIBIT "G"

FRIEND OR FOE?

zenry. The Japanese community was specifically criticized for maintaining "different living and wage standards" and for teaching their children "loyalty to the Imperial Government of Japan." The excitement of the public hearings brought forth in varied and exaggerated forms the hackneyed charges of racial bloc voting, of widespread dual citizenship, of excessively high birth rates, and of other conspiracies to usurp control of Hawaii for Japan: "The great trouble, so far as the Japanese are concerned, is their language schools, and their native feeling for their native country -- they still continue to feel Japanese. I can't agree . . . to the view that they have adopted American customs, because my observation has been quite to the contrary. They remain largely in their home life as they were in their native land. In these language schools they are taught what their fathers were taught. You can say what you please to the contrary. . . ."[7]

On the other hand, statements appreciative of the Japanese appeared with even greater frequency, reflecting the officially acceptable view of the Islands. The report of the Joint Committee of the United States Senators and Representatives conducting the hearings in 1937 was distinctly favorable to the Island Japanese: "It should be remembered that the privilege of naturalization is denied the alien-born Japanese except in certain special cases, or their reaction to the American environment of Hawaii might have more nearly paralleled that of European immigrants. Undoubtedly many would gladly become citizens of the United States, if permitted to do so. In any event, the alien group will pass off the stage within a short time, since they are all reaching old age almost simultaneously. As it is, the younger generation show the same attitude toward America that the first generation American-born of Euro-

[7] *Statehood for Hawaii*, Hearings before the Subcommittee of the Committee on Territories, House of Representatives, Seventy-Fourth Congress, 1936, p. 123.

pean origin do: an appreciation of the material benefits received; a high conception of the freedom enjoyed; and an earnest endeavor to comply with the standards of the new culture.

"On the basis of behavior the American citizens of Japanese ancestry leave little to criticize and much to praise. As an orderly, law-abiding group their record is unexcelled. Their thrift and industry and willingness to cooperate with other groups are all well-marked traits. The evidence of schools and civic organizations, of church and political activities, all point to a desire on their part to share to the full the community responsibilities and to do so as fellow Americans, expressing a common loyalty to American ideals and institutions. Much is made of the foreign-language schools and press, but it should be realized that these agencies serve a real purpose in the adjustment of an immigrant group to new conditions. Many European immigrants have turned to the same means for establishing contact between the two generations. When these transitory vehicles have served their purpose they cease to exist, and there is no occasion to doubt that Hawaii will follow the same pattern already familiar to us on the mainland. The Americanization of the Japanese in Hawaii has perhaps made greater progress than it has with many immigrant groups of longer residence in America living in mainland communities. Time will automatically solve many of the problems that seem to loom up as insurmountable today. The people of Hawaii are to be commended for the manner in which they have undertaken the task of maintaining the democratic principles of America and for having extended them to all its citizens. They are to be congratulated for the degree of success shown by all races in absorbing the spirit of American institutions. In this effort those of Japanese ancestry have taken their full share."

No single lucid picture of the Island Japanese could have

PLAINTIFF'S EXHIBIT "H" 553

STATEHOOD FOR HAWAII

HEARINGS

BEFORE THE

SUBCOMMITTEE OF THE COMMITTEE ON THE TERRITORIES HOUSE OF REPRESENTATIVES

SEVENTY-FOURTH CONGRESS

FIRST SESSION

ON

H. R. 3034

A BILL TO ENABLE THE PEOPLE OF HAWAII TO FORM A CONSTITUTION AND A STATE GOVERNMENT TO BE ADMITTED INTO THE UNION ON AN EQUAL FOOTING WITH THE STATES

OCTOBER 7 TO OCTOBER 18, 1935

Printed for the use of the Committee on the Territories

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1936

the country. I have no fear but that they will make that contribution, whether we have statehood or not.

The CHAIRMAN. Do you favor statehood?

Mr. CHUN. I state the situation as I see it.

The CHAIRMAN. Well, are you in favor of statehood?

Mr. CHUN. In a way, I am.

Mr. CROWE. Which way?

Mr. CHUN. If we can benefit by it, then give it to us.

The CHAIRMAN. Do you see benefit in statehood?

Mr. CHUN. I am for statehood, but I don't see much benefit in it. If we get good out of it, all right. The politicians like it, anyway.

The CHAIRMAN. Does that complete your statement?

Mr. CROWE. I would like to ask a question. You are here to testify, and I haven't found out yet whether you are for or against statehood.

Mr. CHUN. For statehood.

The CHAIRMAN. Without qualification, you are for it, absolutely?

Mr. CHUN. Yes, sir.

The CHAIRMAN. Thank you very much.

We will now hear from Oren E. Long.

Mr. OREN E. LONG. I am superintendent of public instruction of the Territorial schools. My home originally was in the State of Kansas. I attended school at the University of Tennessee, University of Michigan, and Columbia University, New York, having degrees from the two last-named institutions.

I have known Hawaii fairly intimately for a period of 18 years. I have seen it from the standpoint of life on the plantations, where I did welfare work for 2 years, then for a short time as a settlement worker, and the rest of the 18 years I have been in public-school work.

While I speak as an individual, I believe that what I say reflects pretty accurately the attitude of the 2,723 public-school teachers in the Territory at this time. I believe this group feels that the basis for statehood has been very firmly laid by the work of the public schools over a long period of time.

From the standpoint of the schools, there are two very important questions involved in statehood. These are:

First. Have the people of Hawaii the general intelligence and the ability to meet successfully the problems that would confront them under statehood?

Second. Do the citizens of Hawaii have a reasonable understanding of American institutions, and are they loyal to those institutions?

On the basis of my rather intimate understanding of the pupils in the schools, my contacts with the patrons of the schools in the parent-teacher association and my general knowledge of the larger community, I am convinced that each of these questions must be answered in the affirmative.

In discussing the question of general intelligence and appreciation of American institutions, I wish to call to the attention of the gentlemen of the committee the fact that Hawaii has a public-school tradition reaching back almost 100 years. As a matter of record, the first organized educational program in these islands was authorized by a written law of the kingdom promulgated in 1845. The next

jective and the social, religious and industrial leaders of Hawaii have failed.

I do not believe that anyone, who becomes acquainted with Hawaii, can believe for a minute that there has been any such wholesale failure. Our youth have a growing appreciation of our institutions. They are conscious of their citizenship and take pride in it. I am certain of this: No greater compliment can be paid them than to think of them as Americans; no greater insult than to question their loyalty.

The question of loyalty brings up the topic of the language schools—particularly the Japanese language schools. From the standpoint of public opinion, both in Hawaii and on the mainland, the presence of these schools is regrettable. From the standpoint of their possible effect on citizenship, they are likely of no greater significance than the language schools of the mainland that were usually established when considerable numbers of any cultural group settled in the Middle Western States, particularly the German and Scandinavian groups. The history of all such schools has been that they are gradually eliminated. The second and third generations lose interest in them. There is no reason to believe that the local groups will prove to be exceptions in this respect.

It is a matter of record that many local leaders, who are in a position to be best informed, are convinced that the language schools do not play an important part in determining the attitude of the children who attend them. These children spend only an hour a day in such schools. There is little or no enthusiasm among the children for this work. Increasingly, they "go unwillingly to school."

Statements from eight leaders, bearing on the language-school problem are presented to the committee. These statements, by representative educators, were submitted to the department of public instruction in December 1952. The educational background and experience of each writer is given at the beginning of his statement. These opinions as to the possible effect of the oriental language schools on the Americanization program are representative of most of the people of Hawaii.

1. Dr. A. L. Dean, former president of the University of Hawaii: Dr. Dean was born and educated in Massachusetts. He received the degree of A. B. from Harvard University in 1900 and was awarded the degree of Ph. D. from Yale in 1902. For a period of 12 years he was assistant professor at Yale University. He came to Hawaii in 1914 to accept the presidency of the University of Hawaii, continuing in that position until 1929.

"I served on the interracial committee on foreign-language schools which studied these institutions and made recommendations for their regulation. The law which was finally enacted was held by the Federal courts to go beyond the constitutional powers.

"With respect to the Japanese language schools, I am pretty well satisfied on the following:

"(a) They are not sponsored nor controlled by the Japanese Government.

"(b) Their purpose is not to inculcate loyalty to Japan, but is cultural and social.

"(c) Attendance is not due to the desire of the children but of their parents.

"(d) The chief motives of the parents are: (1) Desire that their children shall learn to read, write, and speak good Japanese and thus allow closer family ties; (2) desire that their children be instructed in good manners and gain some appreciation of Japanese culture; (3) desire that the children be kept occupied and out of possible mischief outside regular school hours.

"(c) That the loyalty of the children to the United States is not seriously affected.

(f) That education in the public schools is not interfered with.

"It should be borne in mind that the parents of nearly all of these children are ineligible to citizenship and that they are faced with the dilemma of retaining loyalty to Japan or being men and women without a country. Furthermore, the children are in a difficult transition stage from the mores of their parents to those of America. The maintenance of family control of adolescents and the giving to them of guidance is made abnormally difficult. Although I do not like the idea of the language schools, I am not at all sure that we would not find our problems of social adjustment aggravated if we did not have them."

2. W. Harold Loper, supervising principal of the Honolulu schools: Mr. Loper was born in Iowa. He was educated in the public schools of Iowa and California, and holds degrees from Redlands University and Harvard. He has been in school work in Hawaii since 1922.

"It is my opinion that the foreign-language schools of Hawaii are not un-American nor sponsored for nationalistic motives. The desire that children shall know the language of their parents is the real reason for their support. This opinion is based upon 10 years in the public schools of the Territory and some observation during that time of the foreign-language schools.

"The popular opinion of a few years ago that the work of the language schools interferes with the teaching of English in the public schools is probably false. The only objective study of this problem which I have seen seems to strongly indicate that this is the case. Prof. Percival M. Symonds, in his study of the effect of attendance at Chinese language schools on ability with the English language (Journal of Applied Psychology, vol. VIII, no. 4, p. 411, December 1924) reaches the conclusions:

"(a) That the influence of the home and the playground is about four times as great as that of the Chinese language schools in causing retardation in the English language.

"(b) That for better English we should let the foreign-language schools alone and turn our attention to the home, the playground, and the kind of individuals who are born.

"(c) That correct speech has a worse enemy in the 'pidgin English' of the home than in the Chinese language school.

"I should expect to find the same results in connection with the Japanese language schools."

3. Dr. William H. George, dean of the College of Arts and Sciences, University of Hawaii: Dr. George was born and educated in Pennsylvania. He received the A. B. degree from Harvard University in 1902 and the Ph. D. degree in 1921. He taught at Geneva College (Pennsylvania) from 1907 to 1916, when he resigned to enter the World War. From the close of the war to 1930 he was connected with the University of California and the University of Washington. In 1928-29 he was exchange professor at the University of Hawaii, and since September 1930 he has been dean of the College of Arts and Sciences.

"In regard to the propriety of Japanese language schools in Hawaii, I am convinced that they do not constitute a menace; rather, they are a benefit to our community. They are prompted by cultural and religious motives and not by rampant nationalism. Their aim is to perpetuate the language and culture of Japan. They make no attempt to wean American citizens away from their loyalty to the United States. They do not seek to displace our public-school system, but rather to supplement it.

"Every child should know two languages, the language of its nativity and another. It would be a distinct cultural loss if our young American citizens of Japanese ancestry were to neglect the language of their fathers. So valuable is this training that a goodly number of occidental children have taken advantage of it.

"The attempt to abolish these Japanese language schools was the result of hysteria, and was not based upon a thorough investigation and clear thinking. Surely American civilization is strong enough to stand comparison with the civilization of the Orient. If it is not, it should be buttressed in other ways than by rooting up all other forms of culture in our midst. That would be a proof of weakness, not of strength.

"I wish to go on record, therefore, as favoring the Japanese language schools in Hawaii."

4. O. W. Robinson, supervising principal of the rural Oahu schools (now deputy superintendent of schools): Mr. Robinson is a native of South Dakota. He was educated in the public schools of Louisiana and California, and at Pomona College. He has been in school work in Hawaii since 1917.

"I will comment upon two aspects of language school work, with special reference to the Japanese group:

"(a) *General effect upon school work.*—The Territorial public schools are organized for full-time instruction and, of course, use only the English language. The language schools add 1 full hour of instruction and much more than 1 hour of time to the child's day. The effect upon the child's health and attitude, due to this overworking, is highly questionable.

"Three points must be made if a fair picture of the relationship of the Japanese language schools to the public schools is to be obtained.

"(1) In nearly all Japanese language schools there is a marked trend toward the employment of American-trained teachers. This means, obviously, a closer and more friendly contact between the public-school teachers and the language-school teachers. The language-school teachers are, in the main, quite frank and open and willing to lay their methods and materials of instruction before us for discussion.

"(2) The children who attend the language schools are quite frank in their expressions of distaste and boredom. Just as the German language schools are disappearing on the mainland because of the 'second generation parents', so the Japanese language schools will disappear within the coming 15 or 20 years.

"(3) The Japanese language school does not represent a unified, concerted move on the part of the Japanese people. Each school is built and supported by the group of parents living in that neighborhood. It is not at all unusual to find two Japanese language schools in a community because of factions among the parents. These schisms may be on the basis of religion (it is interesting to note that many of the language schools are Christian), or they may arise from mere incongeniality and personal dislikes. A portion of the Japanese language school program is controlled by a central group, but not the major portion.

"(b) *Effect upon Americanization.*—So far as I have observed, there is no anti-Americanism in the teachings of these schools. There is quite an understandable desire on the part of parents that the children shall know the language of the home and something of the cultural background and traditions of the home. Due to the shortness of the daily teaching period, the work of the language schools is limited almost completely to the language instruction. Only the most meager and cursory attention is paid to the other phases of the problem and, as stated above, I have never observed any activity which I believe should be labeled as anti-American."

5. Miles E. Cary, principal of McKinley High School: Mr. Cary was born and educated in the State of Washington. He was granted the degree of A. B. by the University of Washington in 1917, and A. M. by the University of Hawaii in 1930. During the year 1917–18, he was principal of the high school at Morton, Wash., and of the Ferndale High School from 1919 to 1921. During the year 1917–18 he served in the United States Army. He came to Hawaii in 1921, where he has served as coach of athletics for 2 years, principal of the Maui County High School 1 year, and principal of McKinley High School since 1924.

"This is my thirteenth year as a teacher and principal in the public schools of Hawaii. During this period I have had all sorts of close associations with our young people of Japanese ancestry. I have been with them on camping and hiking parties, as a Hi-Y leader, as club adviser, as participant in their student-body government activities, and so on. I have worked with and observed these young people under a wide range of circumstances and conditions and, because of this fact, I feel somewhat competent to judge their general outlook upon life, their attitude toward other races in Hawaii, and their feelings toward their status as American citizens.

"During all of my experience with the young people of Japanese ancestry at this school, I do not recall a single circumstance where a pro-Japanese or anti-American sentiment became apparent among them. Most of them have attended the Japanese language schools and still do, for that matter. It seems to me that if these language schools were teaching principles and doctrines out of harmony with the spirit of America, surely some of these beliefs or ideas would have come to the surface from time to time, in connection with the activities of those young people at this school."

6. E. V. Sayers, director of the school of elementary education, University of Hawaii: Dr. Sayers holds the degrees of A. B. and M. A. from the University of Indiana and Ph. D. from Columbia University, New York. In addition to 12 years' service in the public schools and the University of Hawaii, he has been in public-school work in Indiana, Washington, and Florida.

"For several years prior to 1926, I served as a member of a committee known as the Governor's committee on foreign-language schools, which, in its later years, worked as a kind of advisory board with the supervisor of language schools. I entered upon the experience of sitting with this committee in the belief that these schools were a disintegrating influence in the community and should be regulated and minimized as much as possible to the point, in fact, of doing away with them entirely. I changed my mind in the course of time, so that by 1926 I had come to look upon these schools as constructive social agencies in the Territory. Briefly, I came to see them as stabilizing factors because of the service they rendered youth that were in danger of losing the social benefits of home and family influence before they had sufficiently accepted the customs and institutions of the American community in which they were growing up. I am firmly of this belief today."

7. Harvey L. Freeland, director of vocational education: Mr. Freeland is a native of Illinois. He is a graduate of the Morehead Normal School and of the University of Minnesota. Before coming to the Territory as director of vocational education, he was in school work in Minneapolis, Iowa, and Nebraska.

"For 10 years I was a teacher in the Minneapolis school system, where many Scandinavian parochial schools existed. For an equal period I was connected with the State Boards for Vocational Education of Iowa and Nebraska, where I had considerable opportunity to observe the parochial schools in those States. From 3 years of experience in the Territory, I believe that the oriental-language schools here have the same general objectives as the parochial schools in the three States named.

"I believe, however, that the majority of students in Hawaii spend only 1 hour a day in the oriental-language schools and the balance of the day in the public schools, while the parochial schools in Minneapolis, Iowa, and Nebraska were conducted on a full-time basis. From such observation as I have made of the oreintal-language schools, they are no more inimical to American welfare than the language parochial schools on the mainland."

8. C. A. Anderson, principal of Mid-Pacific Institute: "During the 9 years that I have been in close contact with Hawaii-born boys and girls of Japanese ancestry, I have found that their parents want them to attend the Japanese language schools in order that they may learn to speak, read, and write Japanese correctly.

"No parent or child has ever even intimated to me that the language schools have any other aim.

"In my opinion, we need not concern ourselves about the possible negative influence of language schools in our endeavor to help boys and girls to become good citizens."

I wish also to present translations of five of the textbooks that are used regularly in the Japanese language schools. [Here Mr. Long presented the books referred to, which are made a part of this record and marked "Exhibit item 5."]

Mr. DEMPSEY. I think I am sold entirely on your very excellent educational institutions here; personally, I would like to hear from you whether you are for or against statehood.

Mr. LONG. I am very much for it, because I believe that education has laid the foundation for it on the basis of general intelligence and loyalty. When you come to a discussion of the question of loyalty, it is very difficult to give reasons for your belief; there are some things that you just can't give a reason for.

Mr. DEMPSEY. I would rather you would tell what benefit you feel the islands would receive as a result of statehood.

Mr. LONG. I am interested from an educational standpoint, from the standpoint of affecting the outlook of the people. The benefit

[fols. 926-967] DEFENDANT'S EXHIBIT No. 1

Community Survey of Education in Hawaii

Territory of Hawaii 1941

[fol. 968] The Testing Program Conducted as a Part of the Community Survey of Education

Hawaii's School System Cannot Be Patterned Exactly upon Any Mainland System

Hawaii should never make the mistake of trying to fit her unique youth to some mainland pattern of education. Her public school system should never become just another school system. Mainland patterns were none of them fashioned for the children of parents who represent seven cultures and have come to live as neighbors and friends on seven isolated islands, in the middle of a great ocean. These children have unique abilities, they present unique problems, and furnish unique delights.

Standardized Tests and Other Material Suited to Local Needs Should Be Used

It is not meant to suggest that the local schools should not make use of standardized tests, that the teachers should not experiment with successful plans and practices of mainland schools, that organization of material and standards of accomplishment used elsewhere should be disregarded. By no means. Regard such helps. Compare, and whenever and wherever possible impove upon the standards and the practices.

Standardized Tests Used for the First Time in the Territory as Part of Survey of Education

For the first time in the Territory a testing program has been made an important part of a survey of education. (See report on the Testing Survey, pp. 66 to 84.) Standardized tests in English (including spelling), in reading, mathematics and hand-writing have been given to every 6th, 9th and 12th grade class in the Islands. The testing involved 19,345 pupils. Mental maturity tests were given to these same classes.

The program was carefully administered under the supervision of one person. The scoring was handled mechanically so as to eliminate error. From the point of view of number of pupils, method of administration, method of scoring, and type of tests, this testing program was such as to justify the drawing of certain definite conclusions from the results.

Though Far from Infallible, Standard Tests Are the Most Reliable Measuring Instruments the Schools Have

If educational tests and measures were absolutely accurate instruments, the capacity and achievement of a child could [fol. 969] be measured as perfectly as the flow of water through a flume, the power of a Diesel engine, or the sucrose content of a stalk of cane. Unfortunately, the best testing devices have no such accuracy. No test makes it possible to state with certainty that a child has exactly this or that amount of intelligence or that he has made exactly this or that academic achievement. The best measuring instruments in these fields are very faulty, but though faulty, they are the most reliable the schools possess.

The test results have been used in three ways:

1. To compare the progress of Island children in the fundamental subjects with the progress of mainland children of the same grade levels.

2. To compare the results of the 1940 Territorial tests with the results of previous tests given to smaller groups.

3. To discover, through a detailed study of the test results, the points at which the schools are weak, so that more effective teaching may result in increased progress.

Conditions Which Make Comparison With Mainland Results Less Reliable Than They Would Otherwise Be

There are factors in the situation which render the comparison with the mainland averages less trustworthy than it would ordinarily be, but it is possible to make at least a rough comparison. The tests used were all standardized on the mainland and in no case is it probable that the standards were based on results secured from testing such a

large proportion of rural children or as many children of foreign-born parents as in Hawaii's schools.

The extent to which poor command of English has influenced the test results in general cannot be estimated. It is well known that there is an English handicap in Hawaii which influences results not only in English but in most of the other school subjects measured by the tests as well.

Test Results Show that 6th Grade Non-English Standard Schools Average Four-fifths of a Year Lower Than the Mainland Averages

The total score of non-English Standard 6th grades in all subjects testde was 5.4. The mainland score is 6.2. This means that the non-English Standard 6th grade average is four-fifths of a year lower than the mainland score. The English Standard schools average 6.2, exactly the same as the mainland. The largest differences in the scores are in reading comprehension and reading vocabulary and in language. The reading vocabulary score in the non-English Standard schools is more than two years below the English Standard score.

Reading Vocabulary and Reading Comprehension Scores Are Lowest

The non-English Standard 9th grade score is 7.7. The mainland score is 9.2. This means that the non-English 9th [fol. 970] grade score is one and one-half years below that of the mainland. The English Standard score is 9.1, slightly below the mainland score. The largest differences, as in the 6th grade, are in reading vocabulary and reading comprehension.

12th Grade Non-English Standard Scores Are One Year Below Mainland Averages

The non-English Standard 12th grade average score is 11.2 which means one year lower than the mainland. The English Standard score is 13.3, a little more than a year above the mainland average. As in the case of both the 6th and 9th grades, the greatest difference is in reading vocabulary.

English Standard Schools Should Have Higher Scores as They Are Not Affected by the Language Handicap

It should be expected that the children in English Standard schools would have higher scores. This is a group selected on the basis of their ability in oral English. All tests are measures of environment as well as measures of achievement or ability. It would be strange indeed if these children did not score higher than the unselected group.

Children in Smaller Schools Made Lower Scores Due in Part to Restricted Environment

Children in smaller schools made lower scores than children in larger schools. This again is to be expected. The very small school is found in remote, rural districts where the environment is limited. The school is only one educational agency. Home environment and community life are also determining factors. *The Intelligence Scores made by children in the smaller schools compare well with these scores in the larger schools.*

Intelligence Tests Are Higher Than Achievement Scores

The pupils in general made higher scores in intelligence than in achievement. In grade VI the achievement was 10 points lower than the intelligence score; in grade IX, 7.8 points lower; and in grade XII, 10.5 points lower. *These figures indicate that the children on the average are achieving below their ability in both English Standard and non-English Standard schools.*

Comparison With Previous Tests Shows Gain

It was possible to compare the 1940 test results with other tests given in 1930, and a very encouraging progress is shown. Progress is again shown by the gain in scores on tests given by Dr. Stephenson Smith in 1924 and repeated in 1938.

[fol. 971] Standards of Accomplishment Should Be Raised and Can Be Raised if School Conditions Are Improved

There is not the slightest doubt but that on the whole the school results are improving, but several of the Survey studies tend to show that while there are brilliant exceptions, the results are not of as high a standard as is desirable and possible if school conditions can be improved.

Efficient Mainland Educational Systems as Large as Hawaii's Have Two or Three Times as Large a Supervisory Staff

There is no good system anywhere on the mainland employing more than 3,000 teachers and including more than 90,000 pupils scattered over the separated districts these seven islands represent, which does not have a supervisory staff which is double or three times as large as Hawaii's. Helpful supervision is an important element in efficient school work. Such supervision is lacking in Hawaii.

A Large Group of Children in Our Schools Learn More Slowly Than the Average; Another Group Learn More Rapidly Than the Average

A large group in the schools of Hawaii, about one-fifth of the children, score low in learning capacity. Another group, about one-eighth, have learning capacity markedly better than the average. These two groups need special attention. (See page 88)

Improvement in English Is Necessary if the Schools Are to Improve in Other Subjects

The tests bring out very strongly the effects of the language handicap on general academic achievement. *To get maximum improvement in school achievement the schools must aim first at improvement in English.*

Many Children Are Two Years or More Behind Mainland Children in English When They Enter School at Six Years of Age

The English problem is the result of environment as well as the result of somewhat ineffective curriculum organization and teaching. Many of our children are two years or more behind mainland children in English when they enter the first grade at six years of age. (See page 117)

There Is Need to Begin Work in English Before the First Grade

As Dr. Porteus and others have pointed out, the most important period so far as control of language is concerned, is the period when children are learning to put words together in order to express meaning. (See especially page

88 and the Report and Recommendations of the Committee on English, pp. 113 and 120.) Speech habits are formed early and these early habits are strong. To change speech habits once formed is a slow and difficult task. Correct [fols. 972-1041] English economy lies in prevention. This is difficult in the local environment but not impossible. *The gradual provision of two years of school control of children before the first grade will change the entire situation unbelievably.*

An Organized Program of Testing Throughout the Territory Would Be of Great Benefit

It is recommended that an organized program of testing be maintained throughout the Territory, not for the purpose of "pigeon-holing" children, but for the purpose of measuring their progress in the development of skills and for finding out what difficulties they are having. It is important that the tests and the testing be uniform for the entire Territory, and that there be a uniform system of recording scores. These records would be of great value to a Curriculum Director.

[fol. 1042] Report of the Committee on English in the Schools

English Has Made Great Advance Since Its Beginning in Hawaii

The story of the English language in Hawaii is closely interwoven with the modern history of the Islands. The new tongue was introduced a century and a half ago when traders and adventurers began to visit the Islands. Only a hundred years ago was the study of English begun in a few private schools. In the Royal School, for example, the children of the chiefs learned to speak the language as freely, it is said, as they used their native tongue.

Before the end of the monarchy English schools had almost entirely displaced those in the Hawaiian language. For more than fifty years now, English has been recognized as the chief language of general government, trade, and education. This ready adoption of the language of the American people is one sign of the real American spirit of the Territory.

"Pidgin English", Formerly a Necessity, Now Retards Progress

A considerable part of the population has, however, never been able fully to take on English speech. During the earlier days there sprang up a simple mixture of Hawaiian and English, as a necessary means of communication. This was used first in the life of trade, and later in work on the plantations. The mixed form has now developed into the Island dialect commonly called "pidgin English."

This local dialect, very different from standard English, is the only speech used on street or playground by most Island-born young people. As a result, the great majority of children are prevented from learning English normally by imitation at home or in the community. Their growth in language is almost wholly confined to the few hours spent in the classroom. Indeed, those who may really want to adopt standard English are held back by fear of ridicule from their comrades.

Further Improvement in English Is Demanded

Thus the next step in the progress of language in Hawaii becomes clear. The acceptance of English by all younger members of the community is essential to the public welfare. Upon this depends full advancement in social and occupational life and in education for American citizenship. Although the Island dialect may continue to be used where needed, it must yield first place to the recognized national language.

In school work also, mastery of English is known to be basic to success. The serious local handicap in language [fol. 1043] leads, therefore, to much delay or failure in learning, and creates confusion in the work of teaching.

Some people feel that the English problem will finally solve itself. They think of the effect of the language requirements of modern business and social life. Perhaps they note the influence of the radio, talking pictures, newspapers, and libraries.

More Effective Plans Must Be Made by the Schools

However, the majority of leaders demand that the schools take a more active hand in the matter. Teachers are asked to develop more effective plans for improving pupils' language.

The Community Survey of Education has, therefore, given much attention to English. In the following parts of this report, it will be shown that schools are already working seriously on the problem. Yet, in the present set-up, certain fundamental weaknesses exist, which, according to wide belief, can be remedied.

The Problem Requires Cooperation by Community Leaders

The English problem is essentially a community responsibility. It can be solved only through the cooperation of educational, legislative, and other leaders. In the following pages, and in the accompanying recommendations, concrete suggestions will be made concerning needed action.

Contents of This Report

Another report to the Committee of Fifteen deals with the results of tests given to all pupils in the sixth, ninth and twelfth grades of the public schools of the Territory. It makes comparisons between accomplishments in local schools and schools on the mainland.

Six Main Questions Are Answered in This Report

In the present chapter, information is given on the following questions:

1. How well can children who enter the first grade speak English?

2. How much do pupils improve in speaking and writing correct English?

3. How well do pupils in different grades write English?

4. How well do high school graduates speak English?

5. What are the schools now doing about the English problem, and what suggestions for improvement do they offer?

6. What general recommendations come out of the answers to these questions?

Below are presented a series of reports, each trying to answer one of the questions. An expanded form of this report, with an appendix showing material from which it was compiled, is being prepared and will be available for use by schools.

[fol. 1044] Question 1: How Well can Children who enter The First Grade Speak English?

Samples of the Conversation of More than 1000 Pre-School Children Were Collected

The material dealing with this question is taken mainly from a study completed in 1937 at the University of Hawaii. More than a thousand pre-school children of foreign ancestry were studied. The groups included were Chinese, Filipino, Hawaiian and part-Hawaiian, Japanese, Korean, and Portuguese. The children ranged in age from two to six years, and included groups from Honolulu, rural Oahu and other islands.

When the children were playing with other children at home or in the neighborhood, samples of their conversation were recorded. One hundred samples of 50 sentences each were taken from the conversation of children enrolled in kindergartens. The kindergarten group was paired, for comparison, with another group not in kindergarten, but containing children who were of the same age and sex, and whose parents were of the same education, birthplace, occupation, and ancestry.

In addition to these samples, 25 fifty-sentence specimens were taken of the talk of children alone with adults. Twenty-one fifty-sentence samples were also secured of the conversation of children of mainland American ancestry.

A total of more than 50,000 sentences, containing 181,561 words, was thus obtained for study.

This report deals only with the results obtained from five- and six-year-olds; that is, from children nearing school age.

Facts Shown Are: 1. Some English Words Were Used by All

All of the children studied, even those whose parents did not employ English as a preferred language, used some English words. By the time children had reached the age of five, more than half the words they used were English words. The lowest per cent of English words (53%) was used by the Japanese. The highest per cent (98%) was found among the Korean and Portuguese children. Japanese children used the lowest per cent (41%) of sentences containing only English words. Portuguese children used the highest per cent (96%).

2. Foreign Words Were Mixed in the Same Sentence With English Words

Mixed sentences, that is, sentences containing both English and foreign words, were used by all children of foreign ancestry. Japanese children employed the highest per cent (31%) of such sentences. Portuguese children used the lowest (3%). City Filipino children used 10%; rural Filipino children, 19%. A few sentences used by Filipino children contained words from four languages.

[fol. 1045] The use of mixed sentences indicates some mental confusion on the part of the children. It also makes much of their speech hard to understand, unless the listener is familiar with the various languages represented.

It was found that most children used fewer mixed sentences after they had entered school. Among only the Portuguese children were there found more mixed sentences after entry. One may conclude that the new contact with other children speaking poorer English produced this change.

The use of English and foreign words is only one measure of language. Two other means are commonly used to measure young children's progress in English. One is the length of sentences; the other is the number of errors per thousand words. Increasing mastery of English is shown by an increase of sentence length, and by a decrease in the proportion of errors.

3. Short Sentences, as Commonly Employed by Mainland Children Two Years Younger, Were Used

Five-year-old children in Hawaii used sentences averaging from 3.4 to 3.9 words long.

Mainland averages for children speaking only one language are:

Three-year-olds, 4.2 word sentences.
Four-year-olds, 4.3 word sentences.
Five-year-olds, 4.7 word sentences.

In contrast, the pre-school children of Hawaii had these averages for all groups of foreign ancestry combined:

Three-year-olds, 3.0 words.
Four-year-olds, 3.4 words.
Five-year-olds, 3.6 words.
Six-year-olds, 3.7 words.

By this one measure of speech mastery, mainland four-year-olds surpass Hawaii six-year-olds of foreign ancestry.

4. The Number of Errors Per 1000 Words Was as Great As That Made by Mainland Children Three Years Younger

The smallest number of errors per 1000 words was made by the Hawaiian and part-Hawaiian group, whose five-year-olds averaged 314 errors per 1000. The largest numbers of errors was made by the Japanese group, whose five-year olds averaged 486 errors per 1000. The few children of American ancestry studied made but 53 errors per 1000.

In contrast, the mainland averages are:

Three-year-olds, 210 per 1000

Five-year-olds, 50 per 1000

[fol. 1046] Mainland three-year-olds surpass any record made by Hawaii's pre-school children of foreign ancestry. By this measure of speech mastery, the local pre-school children are retarded at least three years.

In the groups having the smallest proportion of errors, the number of errors grew greater, rather than less, with increased age. Again, one may conclude that new contacts with children speaking poorer English were responsible for the developing of poorer English.

5. Very Limited Vocabularies Were Used

The vocabularies of the pre-school children of foreign ancestry were appallingly limited. A few words did duty for many. Verb forms, other than the present or present progressive, were rarely used. The only past tense for a common word was "broke". This was ordinarily used instead of "break", as well as for "tear", "tore" or "torn". Very few modifiers were used.

Words employed very often by mainland kindergarten children were used less than one-fifth as often in Hawaii. These include such common words as "chair", "scissors", "arm", "dish", "fork", "fence", "porch", "window", "onion", "pie", "dinner", "garage", "star", "sun", "circle", "bottom", "day", "sometimes", and all names of colors.

A big task faces the teacher who has to teach children entering school the vocabulary they need in order to understand their beginning reading books.

Exceptions in Individual Cases

Certain individuals in each racial group had as good records as those made by children of American ancestry,

although the number of such cases was not sufficient to affect the general results for the group.

Exceptions Among Children of Foreign Ancestry in English Standard Schools

In 1936 a survey was made of oral English usage in the public schools. This survey showed that first grade children of foreign ancestry in English Standard schools used sentences averaging 7.1 words in length, and had only 54 errors per 1000 words. Children of American ancestry in the same grade used sentences 7.8 words long, and made 42 errors per 1000. By the time the pupils of both groups reached the sixth grade, the amount of error was the same for each.

Exceptions in Kindergarten Groups

Children whose records were taken at kindergarten were paired as to age, sex, parental education, occupation and ancestry, with children whose records were taken at home. The kindergarten children used 27% more English words, 31% more English sentences and 7.7% fewer mixed sentences. Their sentences were 0.3 words longer. The number of errors per 1000 words was 64 less than found in the [fol. 1047] group not attending kindergarten. They used conjugated forms for 2.5% more verbs.

Among young children attending kindergarten (of whom 61% were Japanese), 94% used sentences containing only English. These children had records showing mixed sentences in only 3.4% of the cases which is better than any of the home records, except those of the Portuguese children.

A small group of children of Chinese ancestry was studied both before their attending kindergarten, and after their attending kindergarten one year. A vocabulary test developed for small children was used to measure the number of words known. At five and a half years of age they had the vocabularies of three-year-olds of mainland American ancestry. During their year at kindergarten they made a full year's gain. The gain in vocabulary quotient was 7 points. None of the children came from homes in which good English was spoken.

Conclusion Drawn From Answers To Question 1: How Well Can Children Who Enter the First Grade Speak English?

The conclusion to be drawn from this study is that Hawaii's pre-school children of foreign ancestry who do not attend kindergarten are very seriously handicapped in oral English. They enter school with a two to three year retardation in speech.

Only the kindergarten children have a smaller handicap. *Kindergartens are the only hope. They are needed to give pre-school children of foreign ancestry the language mastery children require when they enter the first grade.*

Question 2: How Much Do Pupils Improve in Speaking and Writing Correct English?

Samples of the Oral and Written Language of Many Thousand School Children in All Grades Were Collected

In 1936 and 1937 a survey of the oral and written English of the school children of the Islands was made by securing from as many of the schools as possible samples of written work and five-sentence samples of spoken language as recorded by teachers. Material was received from 73 schools, which contributed samples from one-third of the public school children in the Territory. The oral specimens analyzed were taken from over 13,000 pupils; the written samples, including about 827,000 words, represented 7294 children.

The measure for computing progress in elimination of errors used was the number of errors per thousand words. The degree of progress is shown in Table I.

[fol. 1048]

TABLE 1

Errors per Thousand Words Made by Public School Children in Hawaii

Grade	1	2	3	4	5	6	7	8	9	10	11	12
Non-English Standard Schools												
In oral usage	278	247	173	160	174	150	123	121	115	86	101	83
In written work			134	125	127	107	94	90	88	57	50	44
English Standard Schools												
In oral usage	48	28	41	32	36	30						
In written work			56	50	55	44						

Children in the regular schools make more errors in oral than in written English, probably because they receive constant practice in wrong forms of oral English on the

playground, streets, and even in their homes; whereas, they use written English almost exclusively in school, where it is more readily corrected. The reverse is true of children in English Standard schools, who hear better English in their environment, and are not handicapped so much by the use of other languages; but they find it harder to write English, which they began to do after school entrance, than to speak it, which they began to do in infancy.

The table shows the decrease in number of errors from grade to grade. The progress is more marked in the regular schools, although the curves for the Standard schools show much greater freedom from error in every grade for which information was available.

It should be understood that the oral samples, since they were recorded in the teacher's presence, are not typical of the children's most careless speech. Also, since they included samples spoken on the playground and in informal classroom situations as well as during formal recitation periods, they are not quite the best of which the children are capable. They are samples of language spoken at school when children are aware of the presence of some one who is striving to help them use correct speech.

From the material procured in the 1936-37 survey, tests of English usage were devised that are more valid for use in the Islands than are any mainland tests, because these new tests are based on Island errors. The average scores made on these tests are shown in Table II.

TABLE II

Average Scores Made on Hawaii English Test by Representative Schools*

Grade	4	5	6	7	8	9
Non-English Standard Schools						
No. of cases	577	837	814	658	580	767
Mean score	120	129	136	139	147	152
English Standard Schools						
No. of cases	147	132	116			
Mean score	147	151	153			

* Maximum scores on elementary form—166
Maximum scores on intermediate form—224

[fol. 1049]

[fol. 1049] English Standard children find the elementary test too easy after the fourth grade and many attain almost perfect scores, this indicating that they should be tested by the intermediate test instead. The results show a small but consistant gain from grade to grade. However, ninth grade pupils still answer incorrectly about 30% of the items in the test.

Conclusions Drawn From Answers To Question 2: How Much Do Pupils Improve in Speaking and Writing Correct English?

1. The Proportion of Oral Errors Decreases Steadily Through All Grades

From these two studies we see that there is a marked decrease from the first grade through the twelfth in the proportion of errors made in spoken English. The decrease becomes much more graduat at higher levels. In the non-English Standard schools more errors are still found in the twelfth grade than are made by first-grade children in English Standard schools.

In written English twelfth grade pupils in non-English Standard schools make about as many errors as do sixth grade children in English Standard schools. As will be pointed out in the discussion which follows on Question 3, freedom from error, however, is only one factor in general effectiveness of written expression. It cannot be assumed that because twelfth grade non-English Standard pupils make as few errors as do sixth grade English Standard pupils, their written English is on a par with that of these younger children in other respects. In fairness it must also be pointed out that there is great variation. Some pupils write surprisingly well, while others do very poorly indeed. The figures cited are, of course, for the average of the whole group.

2. The Problem of Errors in Language Is Dependent on Other Factors in Addition to Knowledge of What Is Correct

The fact that many fewer errors are made in writing than in speaking (the proportion in the two highest grades is one to two) seems to indicate that much more is involved than mere knowledge of what is right and what is wrong. If children do not make the same errors in writing, presumably they know that a great many errors in their speech are wrong. The oral problem is a complicated one, affected by habit, social pressure, lack of incentive, and being forced to hear the incorrect forms so much more frequently than the correct forms.

[fol. 1056] Question 3: How Well Do Public School Pupils in Different Grades Write English?

Question Deals With General Effectiveness of Expression Rather Than Grammatical Correctness

To many people "good English" means freedom from mistakes in grammar. However, anyone who reads a letter or listens to a report must realize that there are other essential factors in effectiveness. The following questions also are important:

1. How clearly does the meaning stand out?
2. How interesting is the content?
3. Are the sentences varied?
4. How smooth and pleasing is the wording?
5. Is the personality of the writer revealed?

Thus it is possible that a letter that contains no errors may, nevertheless, be pointless, commonplace, and dull; whereas, one containing some errors may be full of interesting ideas so attractively expressed that the reader might be eager to meet the writer.

Letters Were Collected From 50,000 Pupils Throughout the Territory

This section of the survey, then, has tried to find out how well the pupils in the public schools of Hawaii are learning to put their thoughts into writing. The study was based on friendly letters written by 50,000 children in grades 3 to 12 throughout the Territory. The instructions given the teachers were that the letters should be written "with some real receivers in mind, telling possibly of local news and perhaps of the thoughts of the writers. The letters should be as interesting as possible." No letter was to be longer than one large-size page.

A carefully selected sampling, composed of 2,900 of these letters, was chosen for evaluation by experienced teachers from elementary, intermediate and high schools. Each letter was judged by comparing it with the graded specimen letters ranging from poorest to best in a national composition scale, "The Lewis English Composition Scales for Measuring Business and Social Correspondence."

The table shows that in the non-English Standard schools improvement is not on a steadily rising curve until the intermediate school level is reached. Here progress is more marked. The quality of writing in grades 10 and 11 shows a considerable drop below that for grades 7 to 9.

The Quality of Composition in English Standard Schools Follows Mainland Norms

The letters from the English Standard schools are, in all grades, of much better quality than those from the regular schools, ranging from eight points better in grade 3 to twenty points better in grade 12. The improvement from grade to grade is also much steadier in the English Standard [fol. 1051] schools, and is without the marked drop in effectiveness at the beginning of the senior high school level.

TABLE III

*Median Ratings of Letters Written by Children, Grades 3 to 12 in the Public Schools of Hawaii

Type of School	Grade									
	3	4	5	6	7	8	9	10	11	12
Non-English Standard Schools with Five or More Teachers	29	33	29	35	39	39	44			
Non-English Standard Schools with One to Four Teachers	33	33	35	39	36	39				
Non-English Standard High Schools								34	32	42
English Standard Schools	33	39	48	48	46	48	55	53	58	60

* (Each figure given is for the median or middle letter in a set of 100 letters taken from all the letters submitted by pupils in the particular grade and type of school indicated. These figures give a general picture of the effectiveness of the public schools in teaching children to write English; the value of each single figure is only approximate.)

A comparison with norms for the composition scale used shows that pupils in English Standard schools write about as well as do mainland children at the same grade levels.

Conclusions Drawn from Answers to Question 3: How Well Do Public School Pupils in Different Grades Write English?

1. Schools Are Doing Fairly Good Work in Teaching Children to Write English; but the Quality of Interest Is Not Good

The schools of the Territory are, in general, getting fairly good results in teaching younger pupils to write English, if judgment is based on general effectiveness, and if formal correctness is not taken into account. Local children, as a

whole, learn to organize their thoughts well, to express themselves clearly, and to use fairly well formed sentences. The thoughts treated in written composition are, however, often lacking in lifelikeness and interest.

2. A Study of Teaching Method Is Needed

The fact that the quality of the letters written by pupils in non-English Standard schools is considerably below mainland norms is doubtless due in part to the general language handicap under which such pupils work. It may be that the general emphasis in teaching often is less on ideas than on the form of expression.

[fol. 1052] 3. Special Study at High School Level Is Needed

The especially poorer composition in the senior high school period suggests the need for a special study of all causes and for the adoption of measures to obtain greater gains at this level.

4. The Amount of Better Writing Can Be Increased

The considerable proportion of better letters found shows that many local born children of foreign ancestry can learn to express themselves well, in spite of handicaps. This fact suggests that many more may be capable of doing as well if given proper encouragement and opportunity.

Question 4: How Well do High School Graduates Speak English?

It is commonly recognized that the speech of many school children in the Territory is defective because of the influence of other languages in the homes and communities from which the children come. In this report the term *dialectal* is used to identify such defective speech. It does not refer to regional dialects such as Eastern American, Southern American, or General American speech on the mainland, all of which are in good standing.

Since it has seemed desirable to obtain an idea of the proficiency in speech exhibited by the population of the public schools in the Territory, and since time has been too limited for special research to gain this information, a study of the data already on file at the University of Hawaii has been made. Since these data are based on the speech of graduates of high schools in the Territory, they furnish some pertinent information on the problem at hand.

Speech Tests Given to Applicants for Admission to the University

For the past three years the speech of prospective freshmen has been tested by instructors in the Department of Speech at the University. In this test students were required to read a selection and to answer questions in order to provide samples of their pronunciation and speech rhythm. The standards by which the speech was judged were ordinary mainland standards as observed among average students in mainland schools. For purposes of comparison the speech of students in Roosevelt High School, which is included in this study, might be considered fairly typical American speech. The instructors who did the judging were persons whose training, for the most part, was received in mainland schools. The basic question in their minds when they were doing the testing was: Does the speech sound like English as it is commonly spoken by people of American ancestry and background?

Because the purpose of this study is to give a fairly representative sample of the speech found in the Territorial [fol. 1053] schools, all of the island students who were tested have been included even though some did not enter the University.

Table IV gives the numbers and percentages of prospective freshmen whose speech was tested and classified on a scale of 1 to 5—1 indicating typical American speech and 5 indicating speech that is extremely difficult to understand. For purposes of comparison, the data have been presented for three types of schools, viz., English Standard (Roosevelt), non-English Standard, and private schools, as well as for the total group tested.

TABLE IV

Classification of the Speech of High School Graduates in Hawaii Who Were Prospective Freshmen at the University of Hawaii for the Years 1939-40 and 1940-41.

Classification of Speech*	Graduates of an English Standard School: Roosevelt		Graduates of Non-English Standard Schools		Graduates of Private Schools		Total Graduates in the Study	
	No.	%	No.	%	No.	%	No.	%
1	162	62.3	82	5.2	73	18.6	317	14.2
2	66	25.4	221	14.0	93	23.7	380	17.0
3	30	11.5	408	25.8	103	26.2	541	24.2
4	2	0.8	650	41.1	98	24.9	750	33.6
5	0	0.0	220	13.9	26	6.6	246	11.0
Total	260	100	1581	100	393	100	2234	100

* Code of Classification:
1. Typical American Speech.
2. Slightly defective speech (a lisp or slight dialect).
3. Marked dialectal speech.
4. Very marked dialectal speech.
5. Speech that is very difficult to understand.

Only 19% of the Graduates of Non-English Standard High Schools Speak Acceptable English.

A study of the table reveals that approximately 88% of the tested graduates of Roosevelt High School (which might be taken as a typical American high school) use acceptable American speech; whereas, only 19% of the tested graduates of non-English Standard schools use comparable speech. Forty-two per cent of the tested graduates of private schools in the Islands use speech that is not markedly dialectal. Since the majority of applicants to the University come from non-English Standard schools, we find a total of only 31% who speak without a marked dialect.

[fol. 1054] The Problem Must Be Met Before Pupils Reach High School

Although this study is based upon the speech of graduates of island high schools, it is a common opinion of speech experts that the condition noted above can scarcely be attributed entirely to the failure of high schools to teach English. By the time students have reached high school, their speech patterns are too well established to be remade to any great extent in the time available for teaching speech. Rather the root of the difficulty must lie in the pre-school and early school years when speech habits are being formed, and the solution of the problem depends upon more and better speech training in these formative years.

Over a period of years much progress toward improving the children's speech has been made. One of the most important steps in this direction has been taken by Teachers College, which expects all its graduates to attain an acceptable standard of English.

Recommendations

In addition to the things that are being done, a more definite and more systematic move toward attaining good speech seems advisable. This study points to these recommendations:

1. A Program and Materials Are Needed

That a definite program of instruction and materials appropriate for establishing good speech patterns at the various grade levels be prepared. (A committee made up of public school and university teachers is already at work on this phase of the problem.)

2. Kindergartens Must Be Established

That kindergartens be established so that speech training may be started before incorrect habits are firmly set.

3. Help Must Be Provided for Teachers

That prospective teachers be given more complete training in teaching speech and that speech teachers be employed to work with the regular classroom teachers already in service in the primary and elementary schools.

Even if all these provisions are made, it will be some time before the standard of speech of the general school population can be raised to the level commonly found on the mainland; but without some definite attack on the problem, the Committee believes that progress will be very slow and only sporadic at best.

Question 5: What Are the Schools Now Doing About the English Problem and What Suggestions for Improvement Do They Offer?

In order to understand what the English problem is in the schools, we must ask what they are already doing. To find this out, a questionnaire was sent to all public school principals and teachers in the Territory. Returns were

received from 153 schools, or about four-fifths of the total [fol. 1055] number. These blanks asked the schools to state their English objectives for different grades, to describe how they are teaching English, and to suggest ways to improve the program.

According to these questionnaires, 73 schools (48%) have a definite list of teaching objectives in English; 53 (34%) reported that they have no such list; and 27 (18%) did not answer this question.

The lists of objectives for different grades show that emphasis is given largely to speaking and writing. Less attention seems to be paid to definite goals in reading, even though reading takes up much time in the weekly schedule in the elementary school. Vocabulary growth is seldom named as a specific objective. Teachers' own ideas about their aims often seem vague and confused.

Because the question of definite objectives is often debated, the teachers and principals were asked: Do you believe that there is a general body of facts and skills so important to present day living that all normal children should acquire them in reasonable degree? To this question about 80% of both teachers and principals answered "Yes"; 3% said, "No"; and the remainder expressed no opinion.

It appears from a comparison with figures given above for objectives in English that at least 30% of the teachers of the Territory, although believing there should be working guides in English, do not have them for use.

It is important to know what is happening in the ordinary classroom. Success or failure in the teaching of English depends largely on the regular teacher. Any workable plan for improvement must start with things as they are now. Also, when teachers' problems and routine duties are more widely understood, public opinion—often critical of school policies and of the school product—may become more appreciative and helpful.

First grade teachers spend, on the average, about eleven hours a week teaching English. Fourth grade teachers spend nine hours, and seventh and tenth grade English teachers average seven. Language work alone takes three hours a week in all these grades. Four hours a week are spent on reading in the first and fourth grades, and two hours a week in grades seven and ten.

Both textbooks and activity units are used rather widely in teaching English. Many teachers try to use the most

valuable features of both older and newer theories of education in helping their pupils to learn to speak and write English. Very little use is made of curriculum outlines prepared by teachers to meet particular needs which they have found their own pupils to have.

Through all the grades much attention is given to good enunciation and other speech habits. Formal work in spoken English is carried on in connection with many kinds of classroom activity in the lower grades. Story-telling, dramatics, and singing are common aids to speech im- [fol. 1056] provement. In a few secondary schools there is extensive, organized work on the speech problem. Much attention is given to drill and direct correction in an effort to improve the form of pupils' English. However, in teaching how to avoid errors in language, there seems to be no clear plan of progress from grade to grade.

Teachers in all grades find that two important ways to get pupils to practice speaking are group discussion and such activities as committees and clubs. In the elementary grades excursions or trips encourage thought and expression. Teachers feel, however, that one of the greatest problems is how to arouse the pupils to greater interest in improving their speech.

Much Attention Is Given to Reading, Yet Pupils Still Do Not Come Up to Mainland Standards

In the elementary grades much time is given to reading and to work in vocabulary building. From the fourth grade up, pupils read many books, papers, and magazines, both for pleasure and for information. However, pupils are slow in learning to understand what they read. (According to the results from the Progressive Achievement Tests, pupils in the public schools of the Territory are from $\frac{3}{4}$ to $1\frac{1}{2}$ years behind mainland pupils in the same grade in their ability to understand what they read and in their reading vocabulary.)

Much stress is put upon letter writing, formal composition, and report making. According to results described in answer to question 3, pupils do learn to write in a fairly clear, well-organized form, but cannot find fresh, interesting subjects to write about, and are not free in their expression of personal ideas.

The daily program in English becomes more formal in the upper elementary, and especially in the secondary years. As activities like story telling, dramatics, and singing decrease, there is less opportunity for pupils to practice good speech freely.

English Teaching Is Made More Difficult by Large Classes

The average size of classes is between 30 and 35 in grade one, and increases to between 35 and 40 in grade four. In the seventh grade, city teachers average about 40 pupils per class. Rural seventh grade classes are somewhat smaller. Tenth grade English classes average about 35. Some classes are larger and some smaller than the average. One elementary teacher in every twelve, and one in every four secondary teachers, must try to teach classes containing more than 40 pupils.

Secondary school teachers of subjects such as mathematics, homemaking, science, and physical education very generally feel their responsibility for helping their pupils to learn English. They place much stress upon such things as vocabulary growth, speaking (in recitation or group discussion), and reading habits. They often report that pupils in these classes seem to want to improve their English.

[fol. 1057] Many schools recognize that a general plan in English is needed in order to strengthen classroom work. They do this by means of curriculum outlines, assembly programs, dramatics, library reading, pupil publications, and pupil organizations. In secondary schools, public speaking and essay writing are also emphasized. There is apparently not much regular testing of the progress of pupils in English. The general plan for English work varies much from school to school.

Adjustment of work in English to different abilities is given much attention, especially in the larger schools. This is done mostly by dividing pupils into groups, and by adapting the kind of tasks expected.

Although schools realize that the English problem calls for community cooperation, they report very little immediate aid from outside sources. Speakers for meetings are occasionally secured, and some homes give active support.

In the small schools, having one to four teachers, methods of instruction seem to be somewhat more formal. Less

effort is made to adapt reading and language to pupils' own interests and needs. The children in these schools stand somewhat lower in reading ability and in knowledge of language form; but, they seem fully to equal pupils elsewhere in their enjoyment of personal reading and in their ability to put interesting ideas into their writing.

Suggestions and Recommendations Made by Teachers and Principals

The chief things which teachers and principals feel they need, in order to be able to do better work in English, are as follows:

1. A general Territorial outline of study in English (widely demanded);

2. Practical help from English specialists for work in speech, remedial reading, testing, etc.;

3. Better library facilities (including assistance of trained librarians, especially in the smaller schools);

4. Stronger community support for the school program in English, through such means as parent-teacher organizations, adult education classes in English, and cooperation from employers;

5. Smaller classes, so that pupils can have more opportunity to practice good English and so that there can be more individual instruction (strongly demanded);

6. Further training for both new and older teachers through courses in speech, grammar, and composition, and courses in how to teach English. (*There is considerable feeling that teachers who are especially deficient in their own English should be required to take steps for self-improvement as a condition of remaining in service*);

7. Special study of English problems by teacher groups.

Several schools suggest the help they might receive from a radio hour for instruction in speech and in children's literature.

[fol. 1058] Summary and Recommendations of the Committee on English in the Schools

In the accompanying report, presentation of the results of several carefully conducted research studies reveals

the amount of progress in English made by public school children in Hawaii. Information gathered from teachers and principals throughout the Territory throws light upon the current school program in English and needed changes in plan.

Certain findings from these studies are summarized in the following section. Supporting evidence for the various statements of fact may be found in data on file at the University of Hawaii.

1. The English problem in the schools arises out of conflict between two historical trends in Hawaii—the gradual development of English as the recognized language of the Territory, and the continued hold of the local Island dialect as the common form of everyday speech.

2. The English speech of children when they enter the first grade in Hawaii is 2 or 3 years, on the average, behind that of mainland children of the same age.

Local children who have attended kindergarten do much better in speech during the first grade than do others who have not had this advantage.

These facts were found through detailed analysis of a large number of written records of the free conversation of young children. All the main racial cultures in the Territory were represented in the records. The children's language was studied in regard to such elements as size of vocabulary, freedom from error, and freedom from foreign words.

3. From the first grade through the twelfth there is a large decrease in the English errors made by public school children. In the higher grades, however, progress in mastery becomes much slower.

The amount of poor English is considerably greater in pupils' speaking than in their writing. This seems to show that children often know more about what is right in English than is shown in their everyday language.

In the oral language of seniors in regular high schools, there is a larger proportion of errors in English than in the speech of first-grade children in English Standard schools. In written composition the same seniors make about as many mistakes as are made in the oral language of English Standard sixth-grade pupils.

[fol. 1059] This information was obtained by means of a thorough analysis of the errors found in samples of speech

and of written composition. The samples were collected from many thousand pupils in all grades throughout the public schools of Hawaii.

4. In the qualities of interesting thought and clear way of saying things (correctness of grammar not being considered), pupils' informal written composition seems to be 2 to 6 years, on the average, behind that of mainland children of the same grade. In such qualities of composition it appears that little permanent gain is made from the eighth grade on through the twelfth.

Pupils in English Standard schools do about as well, grade by grade, in this respect as do mainland children.

These conclusions were drawn from a careful study of nearly 3000 friendly letters written by pupils of grades 3 to 12 in all parts of the Territory. The rated value of the letters was found by comparing them individually with the graduated set of samples in a nationally standardized "composition scale".

5. The speech of 80% of the seniors in regular high schools consists in a "marked dialect", which sounds distinctly different from typical American speech. The speech of 15% is so poor that it is hardly understandable.

Only about 10% of the seniors in English Standard high schools have speech that sounds like a marked dialect.

These facts were revealed through speech tests given to more than 1500 high school seniors who were interested in qualifying for admission to the University of Hawaii. The rating was done by groups of University teachers of speech. The one quality judged was the general sound of speech, covering such elements as pronunciation, clearness, rhythm, and inflection.

6. In ability to understand what they read, pupils in local schools are, in general, fully a year behind mainland children of like grade (the retardation varying from ¾ to 1½ years in different grades). This fact is revealed in another report to the Community Survey which sets forth the results of the testing of pupils in grades 6, 9, and 12. (Pages 69-72)

According to the study here reported young folks apparently do considerable free reading of books and periodicals, but much of the reading probably is confined to relatively simple materials.

In the following part of the summary, school conditions that influence pupils' learning of English are described. The information was obtained from questionnaires returned by teachers and principals in 153 (80%) of the schools.

7. The number of pupils in a class is usually between 30 and 40. The class size is more than 40 in 8% of the rooms [fol. 1060] in elementary schools, and in 25% of the English classes (not including core studies classes) in secondary schools.

8. The average amount of time per week devoted to the direct teaching of language at all levels, is reported as 3 hours. In elementary grades an average of 4 hours a week is given to direct work in reading. The time spent in reading at the secondary level is about half as much.

Indirect teaching of both language and reading is much emphasized in work connected with various school subjects. This wider instruction in English is found among both elementary grade teachers and secondary teachers in the several non-English fields.

9. About half of the teachers of the Territory say that no adequate outline of teaching aims has been provided for their use. Their personal ideas about learnings to be sought in English often are not clearly defined. Yet a large majority of both teachers and principals (80%) assert their belief that there is a body of definite facts and skills which should be taught.

10. Active interest on the part of pupils in improving their speech is seldom reported. More encouraging is the occasional mention of eagerness for reading.

Carefulness in the planning of English work varies greatly among teachers, if we may judge from differences noted in the content of questionnaires filled out by them.

11. Schools often have their general policies for encouraging pupil growth in English, although plans are much more fully developed in some schools than in others. Any school organization for this purpose generally includes the provision of curriculum outlines in English and the grouping of pupils according to ability levels. General opportunity for pupil practice of English is furnished through such activities as school assemblies, news writing, and pupil work on committees and in school organizations.

12. Schools generally feel that they receive from the local community only a limited amount of active aid in their plans for better English. What help they do receive comes mostly from speakers at school assemblies and from the parent-teacher organization.

13. Pupils in the small schools make slower progress in reading than do pupils in larger schools. In the quality of ideas expressed in written composition they are fully as advanced as are children in other schools. The teaching of English in small schools seems to be somewhat more formal and less adapted to individual pupil needs.

14. The following means to more successful work in English are considered important by at least half of the schools:

(1) general teaching guides in English, (2) the service of expert advisers in the teaching of English, (3) more [fol. 1061] support from community and homes in attack upon the English problem, and (4) more class time for individual work with pupils and for pupil practice in speaking (the need of smaller classes being especially emphasized).

Other conditions of more successful work, as suggested by a fourth or more of the schools, include (5) more books and periodicals for children's reading, (6) more teacher study of the English problem, through both group meetings and individual reading, (7) courses intended to help teachers improve their own speech, grammar, and class-room practice, and (8) a Departmental requirement that effective steps in self-improvement be taken by teachers who are poor in their daily work or in their own English habits.

Conclusions

1. Teachers and principals are now devoting a large amount of time and effort to the problem of English, and fair results are being secured. The work among different schools is however, irregular in quality; and it often lacks proper guidance.

2. The success of most local children in mastery of the elements of English is considerably less than that of children whose normal home language is English.

In Attacking the Problem of English Many Factors Must Be Considered

3. The causes of the failure of pupils to make better progress in English are complicated. There is no single solution to the problem.

Factors which must be considered include (1) pre-school training in English, (2) planning by schools and community, (3) teacher self-improvement in English, and (4) Departmental organization and service (dependent partly on legislative action).

Constructive Policies for English Are Required

4. Further general advance by our young people in the command of English depends primarily on the formulation of sound, far-reaching policies by educational and community leaders.

As an aid in such policy development, the following set of recommendations—all derived from a careful study of evidence in the accompanying report—is offered.

Recommendations

1. A beginning should be made as soon as feasible in the establishment of pre-school training for small children.

Research study shows that the "lag" of pupils in language growth throughout all twelve grades begins in a retardation of two years or more at the time of entrance to school.

The handicap must be attacked at or near the point of origin, while language habits are in the process of being [fol. 1062] formed. Only after this step is taken can more normal results be expected from school effort during later years.

2. A central Departmental agency for English should be set up for the purpose of coordinating and planning all English work in the schools.

The whole program in English demands definite organization. Special kinds of aid—especially the provision of professional service and of instructional materials—are seriously needed. Various elements of the problem require further research.

The task of initiating an adequate program in English calls for the full time of one person. Planning would

carefully correlated with general curriculum development under other agencies.

3. General teaching guides should be prepared.

The need for more definite outlines in English is widely recognized among schools. Lack of clear planning of instruction often is revealed in school statements concerning teaching objectives.

The proposed teaching guides would set forth definite goals of learning, but would provide for adaptation to individual pupil abilities. As means to this end, graduated "sequences of learnings", rather than set grade objectives, are suggested.

The teaching guides, while including clear outlines for work in English, would encourage local initiative in the making of concrete plans appropriate to individual schools.

The preparation of the guides would be preceded by careful study of current problems. More research is needed, for example, concerning the reading habits of pupils, causes of the lack of desired progress, and the grade placement of different items of instruction.

4. The service of experts in the teaching of English should be made available to schools.

Help in handling specialized kinds of work, such as systematic speech training and the teaching of remedial reading, is widely requested by teachers. Both general instruction and practical demonstration are needed.

Such assistance could best be furnished by full-time field experts. Help might be obtained from University staff members under a cooperative arrangement between the Department of Public Instruction and the University. In larger schools certain regular teachers might well be encouraged to secure the specialized professional training necessary for general school service in various types of English work.

5. Practical courses in English should be more generally provided for the benefit of teachers and principals.

Need is felt especially for the study of speech, grammar, and teaching procedure. Offerings should include both regular University courses and local non-credit courses. The [fols. 1063-1201] latter kind of work would be planned particularly to fit the needs of the more poorly equipped teachers.

6. A permanent Departmental Committee for English should be set up.

This committee would act in advisory capacity to the Department or to the central agency for English. It would study means of giving effect to suggestions made in the accompanying report relative to improvement in classroom method, school organization for English, and community cooperation. It would not be able to handle larger administrative duties such as those proposed for the central Departmental agency.

The committee would consist of representative teachers and community members.

The establishment in individual schools of similar permanent committees for English should be encouraged. Each local committee would direct the school program in English and would serve as coordinator between the school and the Departmental committee.

7. The problem of special aid to small schools should be given further study.

The number of schools with one to four teachers (not including schools in institutions) on September 1, 1940 was 39. The number of pupils enrolled was 2300, or 3% of all pupils enrolled in grades one to eight.

Among problems of these schools to be studied are the need for better equipment, as in library materials, and the need of special aid to teachers, as in the planning of instruction.

8. Reduction in class size must be kept in mind as an essential ideal.

Although the normal solution involves a reduction in the pupil-teacher ratio, relief may be secured in larger schools by administrative adjustment of the pupil load during periods devoted to speech work.

Groups should be small enough to permit more individual instruction and more practice by pupils in speaking under favorable classroom conditions. Until this change can be brought about, pupil progress in English will fall short of desired goals.

[fol. 1202] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF APPEAL—Filed April 16, 1948

[fol. 1203] Notice is hereby given that Ingram M. Stainback, Walter D. Ackerman, Jr., and W. H. Loper, defendants above-named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from the final Amended Judgment entered in this action on the 13th day of February 1948.

Dated at Honolulu, T. H., this 16th day of April 1948.

Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii, Rhoda V. Lewis, Assistant Attorney General of the Territory of Hawaii and Thomas W. Flynn, Deputy Attorney General of the Territory of Hawaii, by Thomas W. Flynn, Attorneys for Defendants.

Iolani Palace.

[fol. 1204] [File endorsement omitted]

[fol. 1205] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION RE PROCEDURE ON APPEAL—Filed April 16, 1948

Whereas, the final Amended Judgment was entered in this cause on February 13, 1948, and

Whereas, on that date the time prescribed for appeal to the United States Circuit Court of Appeals was three months, pursuant to Section 240-8(c) of the Judicial Code (28 U. S. C. A. 230), and

Whereas, by an amendment of Rule 73 of the Rules of Civil Procedure for the United States District Courts adopted by the Supreme Court on December 27, 1946 the time for appeals to the Circuit Court of Appeals was shortened to thirty days, and

Whereas, said amendment of Rule 73, pursuant to Rule 86(b) of said Rules of Civil Procedure, took effect on March [fol. 1206] 19, 1948, at which date the time for appeal to

the United States Circuit Court of Appeals under said Section 240-8(c) of the Judicial Code had not expired, and

Whereas, said Rule 86(b) provides that the former procedure applies whenever in the opinion of the court the application of the amendments adopted by the Supreme Court on December 27, 1946 in actions pending on the effective date of said amendments (March 19, 1948) would work an injustice.

Now, Therefore, It Is Hereby Stipulated By and Between Mo Hock Ke Lok Po, Dai Kung Chinese School, Chung Shan Chinese School Association, Wah Chan Thom, Wilfred Chong and Leong Nget Cho, plaintiffs in the above entitled action, and Ingram M. Stainback, Walter D. Ackerman, Jr. and W. H. Loper, defendants in the above entitled action, by their respective counsel, that the application of the amendment of said Rule 73 shortening the time for the appeal to the United States Circuit Court of Appeals in the above entitled action would work an injustice, and that the court may make and enter its order so finding, and ordering that the former procedure applies to the taking of an appeal to the United States Circuit Court of Appeals from said final Amended Judgment entered February 13, 1948.

[fol. 1207] Dated at Honolulu, T. H., this 16th day of April 1948.

(S.) W. Y. Char, Attorney for Plaintiff; Rhoda V. Lewis, Assistant Attorney General, Territory of Hawaii; Thomas W. Flynn, Deputy Attorney General, Territory of Hawaii, Attorneys for Defendants.

[fol. 1208] [File endorsement omitted]

[fol. 1209] In the District Court of the United States

[Title omitted]

Order re Procedure on Appeal—Filed April 16, 1948

The final Amended Judgment having been entered in this cause on February 13, 1948 and on that date the time prescribed for appeal to the United States Circuit Court of Appeals having been three months, pursuant to Section 240-8(c) of the Judicial Code (28 U. S. C. A. 230); and

By an amendment of Rule 73 of the Rules of Civil Procedure for the United States District Courts adopted by the Supreme Court on December 27, 1946 the time for appeals to the Circuit Court of Appeals having been shortened to thirty days, and said amendment of Rule 73, pursuant to Rule 86(b) of said Rules of Civil Procedure, having taken effect on March 19, 1948, at which date the time for [fols. 1210-1211] appeal to the United States Circuit Court of Appeals under said Section 240-8(c) of the Judicial Code had not expired; and

Said Rule 86(b) providing that the former procedure applies whenever in the opinion of the court the application of the amendments adopted by the Supreme Court on December 27, 1946 in actions pending on the effective date of said amendments (March 19, 1948) would work an injustice; and

The Court being of the opinion and hereby finding that the application of the amendment of said Rule 73 shortening the time for the appeal to the United States Circuit Court of Appeals in the above entitled action would work an injustice; and

The parties having stipulated that this order might be entered;

It Is Hereby Ordered that the former procedure applies to the taking of an appeal to the United States Circuit Court of Appeals from said final Amended Judgment entered February 13, 1948.

Dated at Honolulu, T. H., this 16th day of April, 1948.

(S.) Delbert E. Metzger, United States District Judge.

[fols. 1212-1214] Bond on appeal for $250.00 approved and filed May 14, 1948, omitted in printing.

[fol. 1215] [File endorsement omitted]

[fol. 1216] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

DESIGNATION OF RECORD ON APPEAL—Filed May 14, 1948

To the Clerk of the United States District Court for the District of Hawaii:

Please prepare and certify a transcript of the record in this case to be filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the appeal herein, and include in said transcript the entire record of exhibits, stipulations, testimony and all proceedings had in this cause.

Original and copy of reporter's transcript of proceedings commencing on June 26, 1947 are furnished herewith.

Original and copy of reporter's transcript of proceedings held on February 26, 1947 are likewise furnished herewith.

[fol. 1217] Dated at Honolulu, T. H., this 8th day of May, 1948.

Rhoda V. Lewis, Assistant Attorney General, Territory of Hawaii; Thomas W. Flynn, Deputy Attorney General, Territory of Hawaii, by Thomas W. Flynn, Attorneys for Defendants.

[fol. 1218] [File endorsement omitted]

[fol. 1219] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION FOR ENLARGEMENT OF TIME FOR FILING OF RECORD ON APPEAL—Filed May 21, 1948

It Is Hereby Stipulated and Agreed by and between the parties hereto by their respective attorneys, that the defendants (appellants) may have until the 15th day of July 1948 or a period of 90 days after the filing of notice of appeal, to file the transcript of record in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Honolulu, T. H., this 20th day of May 1948.

Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii; Rhoda V. Lewis, Assistant

Attorney General, and Thomas W. Flynn, Deputy Attorney General, by Thomas W. Flynn, Attorneys for defendants. A. L. Wirin & W. Y. Char, by W. Y. Char, Attorneys for plaintiffs.

[fol. 1220] [File endorsement omitted]

[fol. 1221] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ENLARGING TIME FOR FILING OF TRANSCRIPT OF RECORD ON APPEAL—Filed May 21, 1948

The parties hereto having stipulated that the defendants (appellants) herein may have until the 15th day of July 1948 to file the transcript of record on appeal;

It Is Hereby Ordered that defendants (appellants) herein may have until the 15th day of July 1948, or a period of 90 days following the filing of notice of appeal herein, within which to file the transcript of record on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Honolulu, T. H., this 21st day of May 1948.

(S.) D. E. Metzger, Judge of the above entitled court.

[fol. 1222] [File endorsement omitted]

[fol. 1223] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR ADDITIONAL PORTIONS OF RECORD ON APPEAL—Filed June 9, 1948

To the Clerk of the District Court of the United States in and for the District and Territory of Hawaii:

You are hereby requested to make additions to the transcript of record for filing in the Supreme Court of the United States, pursuant to appeal allowed in the above

entitled cause, and to include in such transcript of additional portions of the record the following papers and exhibits:

1. Reporter's transcript of proceedings commencing on June 26, 1947.

2. Reporter's transcript of proceedings held on February 26, 1947.

3. Appellants' (defendants') Exhibit 1, "Community Survey of Education in Hawaii".

[fol. 1224] 4. Notice of appeal (to the United States Circuit Court of Appeals for the Ninth Circuit).

5. Stipulation filed April 16, 1948.

6. Order filed April 16, 1948.

7. Bond on appeal to the United States Circuit Court of Appeals for the Ninth Circuit).

8. Designation of record on appeal (to the United States Circuit Court of Appeals for the Ninth Circuit).

9. Stipulation for enlargement of time for filing of record on appeal (to the United States Circuit Court of Appeals for the Ninth Circuit).

10. Order enlarging time for filing of transcript of record on appeal (to the United States Circuit Court of Appeals for the Ninth Circuit).

11. This praecipe for additional portions of record on appeal.

Dated at Honolulu, T. H., this 9 day of June 1948.

Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii; Rhoda V. Lewis, Assistant Attorney General, and Thomas W. Flynn, Deputy Attorney General, Attorneys for Appellants, by Walter D. Ackerman, Jr.

[fol. 1225] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1226] [File endorsement omitted]

[fol. 1227] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed June 14, 1948

1. Come now the appellants in the above entitled cause and for their statement of points upon which they intend to rely on their appeal to this Court adopt the points contained in their assignment of errors heretofore filed herein.

2. Appellants designate for printing the entire transcript of the record as certified to you, save and except that as to defendants' (appellants') Exhibit 1 "Community Survey of Education in Hawaii", only the following pages thereof are to be printed: Pages 28 to 32, inclusive, and pages 101 to 122, inclusive.

[fol. 1228] Dated at Honolulu, T. H., this 10 day of June 1948.

Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii; Rhoda V. Lewis, Assistant Attorney General, and Thomas W. Flynn, Deputy Attorney General, by Walter D. Ackerman, Jr., Attorneys for Appellants.

Service of the within statement and designation acknowledged this 10 day of June 1948.

W. Y. Char & A. L. Wirin, by W. Y. Char, Attorneys for Appellees.

[fol. 1229] [File endorsement omitted]

[fol. 1230] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—June 1, 1948

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits.

Endorsed on Cover: File No. 53,019. Hawaii, D. C. U. S. Term No. 52. Ingram M. Stainback, Governor of the Territory of Hawaii, Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii, and W. H. Loper, Superintendent of Public Instruction of the Territory of Hawaii, Appellants vs. Mo Hock Ke Lok Po, an eleemosynary corporation, Dai Kung Chinese School, an eleemosynary corporation, et al. Filed May 7, 1948. Term No. 52 O. T. 1948.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1947~~ 1948

~~No. 789~~ 52

INGRAM M. STAINBACK, WALTER D. ACKERMAN, JR., AND W. H. LOPER,

Appellants,

vs.

MO HOCK KE LOK PO, AN ELEEMOSYNARY CORPORATION, DAI KUNG CHINESE SCHOOL, AN ELEEMOSYNARY CORPORATION, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, AN ELEEMOSYNARY CORPORATION, WAH CHAN THOM, WILFRED CHONG AND LEONG NGET CHO,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT AND TERRITORY OF HAWAII

APPELLANTS' STATEMENT AS TO JURISDICTION

RHODA V. LEWIS,
Assistant Attorney General of Hawaii,
THOMAS W. FLYNN,
Deputy Attorney General of Hawaii,
C. NILS TAVARES,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 789

INGRAM M. STAINBACK, WALTER D. ACKERMAN, JR., AND W. H. LOPER,

Appellants,

vs.

MO HOCK KE LOK PO, AN ELEEMOSYNARY CORPORATION, DAI KUNG CHINESE SCHOOL, AN ELEEMOSYNARY CORPORATION, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, AN ELEEMOSYNARY CORPORATION, WAH CHAN THOM, WILFRED CHONG AND LEONG NGET CHO,

Appellees.

APPELLANTS' STATEMENT AS TO JURISDICTION

Ingram M. Stainback, Governor of the Territory of Hawaii, Walter D. Ackerman, Jr., Attorney General of the Territory of Hawaii, and W. H. Loper, Superintendent of Public Instruction of the Territory of Hawaii, appellants above named, pursuant to United States Supreme Court Rule 12, paragraph one, file this their statement of the basis

upon which it is contended that the Supreme Court of the United States has appellate jurisdiction:

A. The appeal herein is from a final amended judgment made and entered by a District Court of the United States specially constituted under section 266 of the Judicial Code, as amended (28 U. S. C. 380), which provides that a direct appeal to the Supreme Court of the United States may be taken from the final judgment or decree made by such specially constituted district court.

It is further provided by section 238 of the Judicial Code, as amended (28 U. S. C. 345), that a direct review by the Supreme Court may be had where such judgment or decree is rendered under section 266 (section 380 of Title 28 of the United States Code).

By the decision of the majority of the specially constituted three-judge court, convened to hear the above entitled cause, said section 266 was held to be applicable to this cause, which was a suit by plaintiffs to enjoin enforcement of a statute of the Territory of Hawaii alleged to be in violation of the Constitution of the United States. This opinion and the opinion dissenting on this point consider only the applicability of section 266 in the Territory of Hawaii. This is the third of three jurisdictional points considered *infra*, part K of this statement.

B. The territorial statute involved is Act 104, Session Laws of the Territory of Hawaii 1943, now constituting Chapter 31, sections 1871-1876 inclusive, Revised Laws of Hawaii 1945, pp. 281-282 (Appendix #1). The effective date of said statute was July 1, 1943. The validity of this entire statute is involved, by virtue of the judgment of the specially constituted district court holding the entire statute to be in violation of the United States Constitution.

C. The final amended judgment appealed from was made and entered on the 13th day of February 1948.

D. The petition for appeal was filed on March 31, 1948 and presented with an Assignment of Errors (Appendix #6) and allowed on April 16th, 1948.

E. The said final amended judgment appealed from permanently enjoined the governor of the Territory of Hawaii, Ingram M. Stainback, the attorney general of the Territory of Hawaii, Walter D. Ackerman, Jr., and the Superintendent of Public Instruction of the Territory of Hawaii, W. H. Loper, appellants herein, from interfering with the teaching by appellees herein, Mo Hock Ke Lok Po, Dai Kung Chinese School, Chung Shan Chinese School Association and Leong Nget Cho, of foreign languages on the ground or grounds that the pupils being taught have or have not passed any grades in the public schools or its equivalent or have or have not passed any tests in English composition or reading or are or are not of any certain age. The first three of said appellees were found to be eleemosynary corporations incorporated for the purpose of conducting schools for the education of children in the Chinese language. They hereinafter are called the school corporations. The last named appellee was found to be a teacher of Chinese.

Said judgment further permanently enjoined said appellants from interfering with the teaching by the above named appellees of foreign languages on the ground that any teacher teaching foreign languages has not been examined, or certified, by a board of examiners as to his versatility in the usage or idiom in either the Enlish language or foreign language or languages being taught.

Said judment and decree further permanently enjoined said appellants from attempting to enforce against the above named appellees, said Act 104 of the Hawaiian Legislature, enacted May 1, 1943, effective July 1, 1943 (Chapter 31, Revised Laws of Hawaii 1945, Appendix # 1).

F. The original bill of complaint was filed by the school corporations. It alleged that enforcement of said statute by said appellants would deprive the school corporations of their liberty and property without due process of law, and would deprive them of the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. Injunctive relief was prayed for. The answer set up defenses in law and in addition to answering the averments of the complaint, further averred that the simultaneous pursuit at too early a grade of courses of study in dissimilar languages (as distinguished from mere familiarity therewith in and about the home) conflicts with the Territory's purpose of accomplishing universal education in the basic studies, and is contrary to the health and welfare of the children concerned, particularly when the languages are as dissimilar from English as are the oriental languages; further, that it is not necessary to the learning of a foreign language that a child undertake a course of study therein earlier than the fifth grade.

G. An application for a preliminary injunction was heard by a single judge of the United States District Court for the District of Hawaii who assumed for the purposes of his ruling that section 266 was inapplicable. Neither side then contended that it was applicable. Said single judge denied the application for a preliminary injunction on the ground that the record before the court did not present the petition of any parent, pupil, or teacher, that the school corporations were not then operating schools, their schools having been closed since December 7, 1941, and that in applying for a preliminary injunction the school corporations were not seeking to preserve the *status quo* but to undo it, which was not the purpose of such an injunction; also on the further grounds that the territorial statute carried no criminal penalties but was enforceable by an equity proceeding in

a territorial court, and the school corporations had no reason to fear a court of equity, that upon a question of an injunction against the enforcement of a law, the laws of the Territory were to be treated the same as those of a state.

H. Subsequently the "defenses in law" contained in appellants' answer were set for hearing before trial, together with a motion to dismiss the complaint. These defenses and the motion were denied by a single judge, to whom the cause had been transferred by reason of disqualification of the first judge hearing the cause. This judge decided to convene a three-judge court.

I. On the same day that the specially constituted three-judge court convened for the trial of the cause on the merits, an amended complaint was filed. This amended complaint joined as additional plaintiffs, besides the school corporations, two parents of prospective pupils and the above named teacher. The final judgment dismissed the complaint as to the parents on jurisdictional grounds, but allowed it as to the teacher as well as the school corporations.

The amended complaint sought a declaratory judgment and injunctive relief. It relied on the civil rights act (8 U. S. C. A. 41-43), as well as the Fifth Amendment. It prayed for a three-judge court, which was a prayer not contained in the original complaint. Prior to the filing of the amended complaint the three-judge court had determined that it would act as such.[1] The amended complaint contained a prayer for an injunction *pendente lite*, but this application was not renewed by motion or in any way pressed before the three-judge court.

[1] Upon the hearing of this question before the three judges all parties took the position that section 266 was applicable in Hawaii. The Bar Association of Hawaii, appearing as *amicus curiae* at the request of the court, took the position that section 266 was inapplicable in Hawaii. See reference to bar association brief in dissenting opinion (Appendix #4).

J. The case went to trial before the three-judge court, which received expert testimony on both sides, as well as other evidence and exhibits. By stipulation all proceedings and evidence on the hearing of the defenses in law and motion to dismiss were considered the same as though held before the three-judge court. After the trial was concluded three opinions were rendered, one by two judges upholding the jurisdiction of the specially constituted three-judge court to hear the cause (Appendix #3), an opinion dissenting on this point (Appendix #4), and an opinion on the merits (Appendix #5).

Thereafter the three judges concurred in amended findings of fact and conclusions of law, and entered an amended judgment thereon. It is from the final amended judgment that this appeal is taken.

K. Appellants respectfully show unto this Honorable Court the following matters of statutes and decisions, hereby admitting that grave doubts exist as to their right to direct review of the aforesaid judgment by this Court.

1. Since the application for a preliminary injunction was disposed of by a single judge on the original complaint, and not renewed before the three-judge court on the amended complaint, other than by a prayer for such relief which was not pressed before such three-judge court, the case then being set for final hearing, the question arises whether, irrespective of the question of applicability of section 266 in the Territory of Hawaii (on which the members of the three-judge court differed) the case in any event was a proper one for a three-judge court. *Moore* v. *Fidelity and Deposit Co.*, 272 U. S. 317; *Smith* v. *Wilson*, 273 U. S. 388; *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10; *Healy* v. *Ratta*, 289 U. S. 701; *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419, 420.

2. Section 128 of the Judicial Code (28 U. S. C. A. 225) provides that the circuit courts of appeal shall have appellate jurisdiction to review final decisions in the United States District Court for Hawaii in all cases. This is in contradistinction to their appellate jurisdiction over district courts generally, which does not lie where a direct review of the decision may be had in this court under section 238 of the Judicial Code (28 U. S. C. A. 345). This distinction was made by the Act of February 13, 1925, 43 Stat. 936, c. 229, which also provided in section 13 for repeal of "so much of the Hawaiian Organic Act, as amended by the Act of July 9, 1921, as permits a direct review by the Supreme Court of cases in the courts in Hawaii." Previously, since 1909, section 86 of the Hawaiian Organic Act had contained a specific provision that "appeals may be taken to the Supreme Court of the United States from said district court in cases where appeals are allowed from the district courts of the United States to the Supreme Court * * *" (35 Stat. 838; 42 Stat. 119).

The question arises whether the Act of February 13, 1925 requires that the appeal in this case be taken to the circuit court of appeals, rendering inapplicable in any event that part of section 266 which provides for direct review, irrespective of the applicability of that part of section 266 which provides for a three-judge court. Because the Act of February 13, 1925 was not considered by the trial court, appellants have submitted this appeal on the assumption that the holding by the trial court was that all of section 266 applied.

3. If the case was one in which a three-judge court would be required by section 266, notwithstanding the question raised in paragraph 1 above, and if a direct appeal can be had from a court in the Territory of Hawaii to this court

notwithstanding the question raised in paragraph 2 above, then the further question arises whether section 266 of the Judicial Code was adopted and made applicable to the United States District Court for the Territory of Hawaii by section 86 of the Hawaiian Organic Act (48 U. S. C. A. 641-642, 643-645, Appendix #2). Section 86 at all times since its original enactment (31 Stat. 141, c. 339) has provided that: "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii." (48 U. S. C. A. 645, Appendix #2). Said section 86 also provides that the laws relating to jurisdiction of district courts of the United States and the manner in which they proceed shall govern the court created by said section 86 (48 U. S. C. A. 642, Appendix #2). The question turns on whether section 266 is such a law as was contemplated by these provisions.

One of the purposes of section 266 is to make interference by interlocutory injunction with state legislation a matter for the adequate hearing and full deliberation which a court composed of three judges is likely to secure. *Stratton* v. *St. Louis Ry. Co.*, *supra*. The statute therefore is based upon avoidance of needless friction with state policies, hence is based on the same principle which leads the federal courts to defer to the final authority of a state court to interpret statutes of the state. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496 (1941). This court has said that the federal district courts are to defer to the territorial courts in such matters. *De Castro* v. *Board of Commissioners*, 322 U. S. 451, 459 (1944).

That Congress intended to establish in the Territory of Hawaii, between the federal court created by the Hawaiian Organic Act and the system of territorial courts then existing and substantially by that act perpetuated, the relation which exists between the courts of the United States and the state courts in the various states, was held soon after the enactment of the Hawaiian Organic Act. *Wilder's S. S. Co.* v. *Hind*, 108 Fed. 113, 114-115 (C. C. A. 9th, 1901, aff'd 183 U. S. 545). This principle became established in a series of cases holding that the federal rule against interference by habeas corpus with the proceedings of state courts is equally applicable in the Territory of Hawaii. *In re Marshall*, 1 U. S. D. C. Haw. 34 (1900); *In re Atcherley*, 3 U. S. D. C. Haw. 404, 421 (1909); *Soga* v. *Jarrett*, 3 U. S. D. C. Haw. 502, 506 (1910); *In re Curran*, 4 U. S. D. C. Haw. 730, 738 (1916).

Such judicial pronouncements as to the autonomy of the territorial system of courts in Hawaii are confirmed by the legislative history of the Hawaiian Organic Act. Hawaiian Commission Message, Doc. No. 16, 55th Cong. 3d Sess., pp. 162-4; House Report No. 305, p. 19, of Committee on Judiciary on H. R. 2972, 56th Cong. 1st Sess., which bill was later incorporated by the House into S. 222, the Hawaiian Organic Act (see House Report No. 549, 56th Cong., 1st Sess.); 33 Cong. Rec. 1871, 1929, 1932-4, 2025, 2123-4, 2133, 2189, 2191-4, 2388-9, 2397, 2398-2400, 2441.

This court has said that an adoptive statute, such as section 86 of the Organic Act above quoted, embraces subsequent changes in the law adopted "that are not obviously inapplicable." *Balzac* v. *Porto Rico*, 258 U. S. 298, 302; to the same effect, *In re Maret*, 145 F. 2d 431, 436, note 28 (C. C. A. 3d 1944); cf. *Mookini* v. *United States*, 303 U. S. 201, 205. This principle perhaps was overlooked in

the Puerto Rico cases relating to three-judge courts.[2] In any event the Puerto Rico insular courts do not have the same historical autonomous position as do the courts of the Territory of Hawaii.

Section 266 of the Judicial Code, though appropriate to Hawaii in its purpose to avoid hasty and ill considered interference with respect to statutes of the Territory, possibly was rendered partially inappropriate in Hawaii by the 1925 act repealing "so much of the Hawaiian Organic Act • • • as permits a direct review by the Supreme Court of cases in the courts in Hawaii" (Par. 2, supra). But even if a direct review is not allowable, the provision for a three-judge court still is appropriate. Review by a Circuit Court of Appeals of a decision of a three-judge court is not unheard of. *Healy* v. *Ratta*, 67 F. 2d 554 (C. C. A. 1st 1933), reviewed 292 U. S. 263; *Phillips* v. *United States*, 312 U. S. 246, 254; cf. *Query* v. *United States*, 316 U. S. 486. In *Smith* v. *Wilson, supra*, this court left open the possibility that it is not erroneous for three judges to sit even when the appeal must be to the Circuit Court of Appeals. In Hawaii a three-judge court apparently is the method provided for review of an order of the Interstate Commerce Commission, pursuant to the Act of October 22, 1913, 38 Stat. 220, c. 32, abolishing the Commerce Court,

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[2] *Benedicto* v. *West India & Panama Telegraph Co.*, 256 Fed. 417 (C.C.A. 1st 1919); *Munoz* v. *Porto Rico Light & Power Co.*, 83 F. 2d 262 (C.C.A. 1st 1936), cert. den. 298 U. S. 689, 80 L. Ed. 1408, the Circuit Court of Appeals citing *Kendall* v. *United States*, 12 Pet. 524, 625, 9 L. Ed. 1181 and *In re Heath*, 144 U. S. 92, 36 L. Ed. 358, but not *Balzac* v. *Porto Rico, supra; Porto Rico Light & Power Co.* v. *Colom*, 106 F. 2d 345 (C.C.A. 1st 1939), cert. den. 306 U. S. 617.

yet an appeal to the Circuit Court of Appeals may be required by the 1925 Act, supra.

Dated at Honolulu, T. H., this 16th day of April, 1948.

Respectfully submitted,

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Attorney General of the Territory of Hawaii.

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C. NILS TAVARES,
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APPENDIX I

Act 104, Session Laws of Hawaii 1943 (Chapter 31, Revised Laws of Hawaii 1945)

An Act Regulating the Teaching of Foreign Languages to Children

Be it Enacted by the Legislature of the Territory of Hawaii:

(Sec. 1871) Section 1. *Declaration of legislative findings.* It is hereby declared that the study and persistent use of foreign languages by children of average intelligence in their early and formative years definitely detract from their ability properly to understand and assimilate their normal studies in the English language, which are required by law to be pursued by all children of school age, and definitely retard their progress in understanding and assimilating such studies; that the study and persistent use of such foreign languages in such early and formative years may and do, in many cases, cause serious emotional disturbances, conflicts and maladjustments; that the teaching of foreign languages compels and encourages the study and persistent use of such foreign languages, to the detriment, as aforesaid, of children in their early and formative years; that it is to the best interest, and will best promote the health and welfare, of children of tender age that such foreign language studies not be undertaken until each child shall have completed and passed at least the fourth grade or shall have attained the age of nine years, unless such child is earlier able to speak, write and read the English language and has attained a test score of at least 5.0 on standard tests in composition and in reading; and that the teaching and study of foreign language to and including the eighth grade or the age of fifteen years should be regulated in the public interest to avoid the detrimental results herein set forth to which end each of the provisions of this Act shall be enacted.

(Sec. 1872) Section 2. *Definitions.* As used in this Act:

(a) "School" means any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice.

(b) "Public school" means a public school as defined in section 729 of the Revised Laws of Hawaii 1935.

(c) "Standard test" shall be the test which is so designated and determined by the department of public instruction from time to time from such tests as are generally recognized by educators.

(Sec. 1873) Section 3. (*Qualifications of pupils.*) No child shall be taught a foreign langauge in any school unless he shall comply with one of the following requirements: (a) That he shall have passed the fourth grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the department of public instruction attaining a score not lower than normal for his grade; or (b) that he shall have passed the eighth grade in public school or its equivalent; or (c) that he shall have attained the age of fifteen years.

(Sec. 1874) Section 4. (*Qualifications of teachers; board of examiners.*) No school shall permit the teaching of any foreign language to any child under the age of fifteen unless the teacher shall have been examined and certified by a board of examiners of three persons appointed by the commissioners of public instruction to be reasonably well versed in the usage and idiom of both the English language and the foreign language to be taught by such teacher. The commissioners of public instruction shall appoint one or more of such boards of examiners as may be necessary. Of the members of each such board, at least two shall be well versed in the usage and idiom of both the English language and the foreign language to be taught by the teacher to be examined, and the third shall be well versed in the usage and idiom of at least one of said languages. Such board shall

examine each applicant to teach such foreign language. If such applicant is found to be qualified pursuant to this section, such board shall so certify to the commissioners, who shall cause a certificate of such qualification to be issued to such teacher. No charge shall be made for such examination and certification. The expenses of such boards of examiners, including compensation, if any, allowed by the commissioners of public instruction, shall be paid out of any appropriations for the department of public instruction for general administration of teachers' salaries, or both.

(Sec. 1875) Section 5. (*Inspection by department of public instruction.*) Any supervising principal, or other duly authorized representative of the department of public instruction of the Territory, at any time during which such school is in operation, shall have power to attend any school, for the purpose of ascertaining whether the provisions of this Act are being complied with, and it shall be the duty of every person in charge of, or employed at, such school to permit such representative of the department at any such time to attend the classes and activities of such school for said purposes.

(Sec. 1876) Section 6. (*Proceedings to ensure compliance; duties of attorney general and county attorneys.*) In the event any school or any person shall be found to be violating, or failing to comply with any of the requirements of, this Act, or there shall be reasonable cause to believe that such school or person is violating, or failing to comply with the requirements of, this Act, the attorney general, at his own instance or at the request of the department of public instruction, shall institute appropriate proceedings in equity in the circuit court in which the violation occurs to enjoin the performance of any acts or practices forbidden by this Act, or to require such school or person to comply with the requirements of this Act. Jurisdiction to hear and dispose of all actions under this section is hereby conferred upon each circuit court, and each such court shall have power to issue such orders and decrees, by way of injunction, mandatory injunction or otherwise, as may be ap-

propriate to enforce the provisions of this Act. In the event any respondent or respondents shall fail or refuse to comply with any such order or decree, the court, in addition to any other powers hereby granted, shall have power to enjoin the operation and conduct of such school until and unless this Act is complied with or satisfactory assurance is given that this Act will be complied with. The county attorney of each county shall, at the request of the attorney general, conduct such proceeding in behalf of the Territory. All such suits shall be brought in the name of the Territory by the attorney general.

Section 7. (Saving clause.) If any portion of this Act, or the application thereof to any person or circumstance, shall be held to be unconstitutional or invalid, the remainder of this Act, or the application of such portion to other persons and circumstances, shall not be affected.

Section 8. This Act shall take effect upon July 1, 1943.

APPENDIX II

U. S. Code—Title 48

Territories and Insular Possessions (Pages 4173-4174)

(Sec. 86 of the Hawaiian Organic Act)

Sec. 641. District court; sessions; powers; terms.

There shall be established in the Territory of Hawaii a district court, to consist of two judges, who shall reside therein and be called district judges, and who shall each receive an annual salary of $10,000. The two judges shall from time to time, either by order or rules of the court, prescribe at what times and in what classes of cases each of them shall preside.

The two judges may each hold separately and at the same time a session of the court (whether at the same or different terms of court, regular or special) and may preside alone over such session. The said two judges shall have the same

powers in all matters coming before the court; and in case two sessions of the court are held at the same time, the judgments, orders, verdicts, and all proceedings of a session of the court, held by either of the judges, shall be as effective as if one session only were being held at a time.

Regular terms of said court shall be held at Honolulu on the second Monday in April and October, and special terms may be held at such times and places in said district as the said judges may deem expedient. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; July 9, 1921, ch. 42, § 313, 42 Stat. 119; Feb. 12, 1925, ch. 220, 43 Stat. 890; Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919; July 31, 1946, c. 704, 60 Stat. 716.)

Sec. 642. Jurisdiction of district court; authority of officers.

The said court shall have the jurisdiction of district courts of the United States, and shall proceed therein in the same manner as a district court; and the said judges, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district courts of the United States. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; July 9, 1921, ch. 42, § 313, 42 Stat. 119.)

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Sec. 643. Appointment and term of office of judges, district attorney, and marshal.

The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint two district judges, a district attorney, and a marshal of the United States for the said district, all of whom shall be citizens of the Territory of Hawaii and shall have resided therein for at least three years next preceding their appointment. Said judges, attorney, and marshal shall hold office for six years unless sooner removed by the President. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; July 9, 1921, ch. 42, § 313, 42 Stat. 119.)

* * * * * * *

Sec. 644. Salaries of clerk and reporter; deputy clerk.

A clerk of the district court shall be appointed as provided in section 6 of Title 28, at a salary to be fixed in accordance with section 558 of Title 28. The number and compensation of deputy clerks shall be fixed by the attorney general as in other judicial districts. The said district judges shall appoint a reporter of said court at a salary of $1,200 per annum. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1412; July 9, 1921, ch. 42, § 313, 42 Stat. 119; June 1, 1922, ch. 204, title II, 42 Stat. 614, 616; Jan. 3, 1923, ch. 21, title II, 42 Stat. 1084.)

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Sec. 645. Appeals.

Appeals from the said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same manner as appeals are allowed from district courts to circuit courts of appeal as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; July 9, 1921, ch. 42, § 313, 42 Stat. 119; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54.)

APPENDIX III

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT AND TERRITORY OF
HAWAII

CIVIL ACTION

Civil No. 765

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, an Eleemosynary Corporation, WAH CHAN THOM, WILFRED CHONG and LEONG NGET CHO, *Plaintiffs*,

vs.

INGRAM M. STAINBACK, C. NILS TAVARES and W. H. LOPER, *Defendants*

Opinion of the Court Re Applicability of Section 266 Judicial Code of the United States

MCCORMICK, *District Judge*;

By the amended complaint in this action, three eleemosynary corporations duly organized for the purpose of conducting schools in the Territory of Hawaii for the education of children in the Chinese language, a pursuit they had been lawfully carrying on long prior to certain territorial legislation in part embodied in the Revised Laws of Hawaii, 1945, as Chapter 31, jointly with three personal plaintiffs, citizens of the United States of Chinese lineage and residents of the Territory of Hawaii seek an injunction to restrain appropriate territorial executive officers from enforcing provisions of Chapter 31, upon the ground that the questioned territorial legislation is unconstitutional and violative of the plaintiffs' liberty and property without due process of law in contravention of the 5th Amendment.

Subsequent to the denial of plaintiffs' motion for a preliminary injunction by the District Judge presiding at the

time and pursuant to the request of the plaintiffs stated in the amended complaint and confirmed in open court by the express desire of defendants, three accredited federal judges designated by District Judge Metzger, before whom the cause was then pending, assembled to finally hear and determine the suit in the District Court established in the Territory of Hawaii by Sec. 86 of the Hawaiian Organic Act, as amended. Title 48, Sec. 641, et seq., U. S. C. A.

At the outset of proceedings the suggestion was made that the three judge procedure in the federal courts is not applicable to the District Court established by Congress in the Territory of Hawaii and was therefore inoperative in the instant suit. Such suggestion poses an important and crucial question in the case at bar, namely, whether Sec. 266 of the Judicial Code of the United States, as amended, Title 28, Sec. 380, U. S. C. A., is applicable in the District Court in the Territory of Hawaii. We are of the opinion that it is applicable to the situation before the Court in the suit at bar.

The Supreme Court had before it in *Farrington v. Tokushige*, 273 U. S. 284 (1927) a situation to an extent similar to the instant proceeding in that there was involved an application for an interlocutory injunction to restrain territorial executive officers of Hawaii from attempting to enforce a Hawaiian territorial legislative act relating to foreign language schools. In that case, the Court impliedly decided that the District Judge had jurisdiction to hear and determine the right to an interlocutory injunction. However, even if it be assumed that the three judge requirement in Section 266 of the Judicial Code was thereby held to be not applicable to the proceedings in the District Court in Hawaii there under consideration, we think such conclusion does not solve the problem before us at this time.

Here we are dealing with the Statute as Amended, 43 Stat. 938, which in pari materia states

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

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And here we must also consider the question in the light of procedural innovations specifically established and currently relating to the district court of the United States for Hawaii. Title 48, Sec. 646, U. S. C. A.

Support of the argument of inapplicability of the three judge "procedural protection" against single judge injunctive process in the district court in Hawaii is predicated upon decisions pertaining to judicial procedure in Puerto Rico. *Benedicto v. West India & Panama Telegraph Co.* (C. C. A. 1, 1919), 256 Fed. 417; *Munoz v. Porto Rico Ry., Etc. Co.* (C. C. A. 1, 1936), 83 Fed. (2) 262. We think there is a wide difference between the basic governmental structure and identity of Hawaii and Puerto Rico. In the latter "possession" only certain statutory laws of the United States are applicable therein, Title 48, Sec. 734, U. S. C. A. whereas in the "territory" of Hawaii, The Constitution, and all the laws of the United States which are not locally inapplicable, are effective identically as "elsewhere" in the United States. Title 48, Sec. 495, U. S. C. A.

Indeed, the clear and basic governmental differences in the two political units and in their respective judiciaries is recognized as far back as 1919 where the Court of Appeals in the Benedicto decision stated:

> "We have no occasion to inquire whether Section 266 might not apply to continental territories more closely related to the United States than that of the possession or quasi territory of Puerto Rico."

Moreover, the Supreme Court in *Balzac v. Porto Rico*, 258 U. S. 298, and in *Downes v. Bidwell*, 182 U. S. at p. 305, so conclusively distinguishes the governmental characteristics of Puerto Rico and of Hawaii as to make the decisions relating to courts in Puerto Rico of no application whatever to the question under consideration in this Court.

All pertinent adjective prerequisites specified by the Supreme Court in *Ayrshire Collieries Corp. v. United States*, decided April 28, 1947, and in *Farrington v. Tokushige*, supra, necessary to make operative three judge participation in the instant suit have occurred. An interlocutory injunction has been sought and passed to a hearing in the

District Court at Honolulu and a substantial federal question of transcending limitations of the 5th Amendment to the Constitution has been sufficiently alleged in the Amended Complaint.

In our opinion, discussion of any different elements between "constitutional" and "legislative" courts is entirely beside the point of our inquiry and is a mere abstraction.

The suit at bar from its inception has been at all times in the same forum, namely in the District Court established in the Territory of Hawaii by the Congress of the United States. The jurisdiction of such Court, in the sense of its right and power to hear and determine causes and proceedings has been explicitly stated by the creative authority to be that of "district courts of the United States," no more and no less, and it is expressly required by Statute to proceed in the same manner as a United States District Court. Title 48, Sec. 642, U. S. C. A.

Undoubtedly, a statute which departs from the procedure traditionally employed in single judge tribunals, as Section 266 of the Judicial Code does, should in applicable situations be given "narrowness of scope", *Phillips v. United States*, 312 U. S. 246, at p. 251, and must be construed "as an enactment technical in the strict sense of the term and to be applied as such" but if it be admitted, as it must, that the District Court in Hawaii has jurisdiction to consider and decide suits seeking to have territorial legislative acts declared unconstitutional, it does violence to the Congressional intent, if not to the words used in the last sentence of Amended Section 266, to hold that the federal district judges in Hawaii have prerogatives and larger powers to enjoin statutes of general application in the sensitive local area involved than those of other federal courts. We think such construction is not imperative and in the light of the language used, and the manifest congressional intent, it should be avoided.

Nor do we think that there is any need to philosophize or surmise why Congress, in dealing with situations in Hawaii, invested or restricted Courts which it continued or established there, or which it established in other territories or possessions of the United States, with dissimilar

procedural methods in disposing of injunction applications which seek to restrain the operation or enforcement of territorial Statutes upon the ground of repugnancy to the Constitution of the United States. There can be no doubt that Congress has paramount and plenary authority to legislate in all matters appropriate to the people of the territory of Hawaii—*Inter-Island Co. v. Hawaii*, 305 U. S. 306.

If there had been any reason in the *Farrington v. Tokushige litigation* to doubt that the intent of Congress that the scope and composition of the District Court of the United States of Hawaii should be, with relation to provisional or final remedies in suits for injunction to restrain local legislation upon the ground of unconstitutionality, the same as in Federal District Courts throughout the States, the uncertainty has been expressly and clearly removed by subsequent specific Congressional legislation, Title 48, Section 646, U. S. C. A., F. R. C. P. 1, 65 (e).

There being no authoritative ruling to the contrary, there is sound reason to conclude that the "mischief" which Congress sought to remedy by enacting and amending Section 266 of the Judicial Code impends in Hawaii similarly as it does in the States.

The chief obstacle to applying the "procedural protection" of Section 266 of the Judicial Code to Hawaii appears to be the repetitive use of the word "State" in the Statute. But we think that when the civic aspects of the situation are considered, the "procedural protection" of the public interest in the mind of the law-making agency connotes a meaning of any separate political community such as the Territory of Hawaii as well as those political subdivisions of the Nation known as States of the Union.

In *Talbot v. Silver Bow County*, 139 U. S. 438 (1890) the Supreme Court had occasion to interpret the meaning of the word "State" in an act of Congress relating to the right of the Territory of Montana to assess a tax on National Bank Stock—whereas under the literal terms of the Act in question, only "States" were given authority to tax such stock.

In holding that the territories possess the same power of taxing National Banks which States enjoy the Court said:

At page 441: "In this section no express reference is made to Territories; States only are mentioned. Tested by the letter, the argument is short and clear. Congressional permission is essential; no permission is given to the Territories; therefore, Territorial taxation is unauthorized and void. Whatever may be the voice of the letter, the argument fails because the minor premise cannot be sustained. Can it be that Congress meant to give power to the States to tax, and to withhold that power from the Territories? Some plausible reason should be suggested before the intention is imputed to Congress of granting to an independent jurisdiction, such as a State, the power to tax one of its own instrumentalities, and at the same time withholding a like power from a political organization like that of a Territory wholly dependent upon Congress, and subject to its absolute supervision and control. Such is not the ordinary lesson of experience. If the matter in respect to which such an intent was imputed were wholly of interest to the States, or designed purely for the exercise of powers within the States then properly all general expressions in the statute might be limited to States, and the intent of Congress be supported and established by the character of the subject-matter of the legislation. The converse of this is true. The national banking system was national in its design, coextensive in its operation with the territorial limits of the United States, and intended to be the banking system for the whole country, Territories as well as States."

When we examine the several provisions of the Organic Act of Hawaii relating to the District Court, its jurisdiction, grant and limitation of powers, manner of appeals therefrom and the concomitant Rules of Federal Procedure operative therein, we perceive a unitary judicial system functioning, except as to tenure of the Judges, precisely as in the several States, and we conclude in line with the reasoning of the Court in the *Talbot* case, that the word "State" in Section 266 of the Judicial Code, as amended,

is not intended by Congress as in contradistinction to the Territory of Hawaii but on the contrary the requirement respecting the presence of three judges is mandatory in the suit at bar in the District Court of the United States for Hawaii.

It is so ordered—

———,
United States Circuit Judge;
(S.) PAUL J. MCCORMICK,
United States District Judge;
(S.) DELBERT E. METZGER,
United States District Judge.

APPENDIX IV

(PO v. STAINBACK, Civil No. 765)

DENMAN, *Circuit Judge,* dissenting:

The question here is whether Congress in enacting Judicial Code Section 266, as amended 28 U. S. C. 380, conferred on the territorial district courts created by it in Hawaii and Alaska the jurisdiction to act as three-judge tribunals in suits to enjoin territorial officers from enforcing territorial laws alleged to violate the Federal Constitution.

I dissent from the court's holding that Congress gave jurisdiction in such cases under Section 266 to its territorial courts. The Supreme Court in a series of decisions, culminating in Phillips *v.* United States, 312 U. S. 246, 248 et seq., holds that Section 266 is not "a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." It is there stated that that section is to be construed to avoid "a serious drain upon the federal judicial system *particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice.* (Emphasis supplied.) Unless it be strictly construed "Section 266 would defeat the purposes of Congress, as expressed by the Jurisdictional

Act of February 13, 1925, to keep within narrow confines our appellate docket. Moore *v.* Fidelity & D. Co., 272 U. S. 317, 321 . . . ."[3]

Briefly summarized, my dissent is to the court's failure to give a strict interpretation of Section 266 to the end that it will minimize the drain on the service to litigants of federal judges in drawing them to distant places and away from their resident courts and "keep within narrow confines . . . (The Supreme Court's) appellate docket."

No case could better than this illustrate the drain on federal judicial power in taking judges to distant regions. District Judge McCormick and myself in travel to and from Hawaii in the trial and subsequent conferences have been taken for several weeks from our needed services to our litigants in our respective courts. Also Judge Metzger spent several weeks in travel from Hawaii to and from San Francisco and in necessary conferences with us on the mainland. One of Hawaii's two district judges, Judge McLaughlin, was disqualified, thus requiring the calling from the mainland of Judge McCormick to complete a three-judge tribunal. Judge McCormick's court in the Southern District of California is so overcrowded with litigation that the Ninth Circuit Conference at its meeting in July 1947 requested of Congress that another judgeship be created for that district.

The court's opinion in so failing to apply the rule of the Phillips case has caused it (a) to inserf in Section 266 the

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[3] So also in the recent case of Ayrshire *v.* United States, 91 L. ed. 1006, 1009 (April 28, 1947), where, under an analogous three-judge statute, three judges heard and had submitted to them the merits of the case. Because of illness, but two participated in the subsequent decision. Applying the rule of strict technical construction of the Phillips case the Supreme Court reversed, holding that the statute required that the cause not only should be heard but that it should be determined by three judges.

Other cases of strict construction of such a three-judge statute are Gully *v.* Interstate Nat. Gas Co., 292 U. S. 16, 18; Oklahoma Gas & E. Co. *v.* Oklahoma Packing Co., 292 U. S. 386; Moore *v.* Fidelity & Deposit Co., 272 U. S. 317; Smith v. Wilson, 273 U. S. 388; Ex parte Collins, 277 U. S. 565; Ex parte Williams, 277 U. S. 267; Ex parte Public National Bank, 278 U. S. 101; Rorick v. Everglades Drainage Dist., 307 U. S. 208; Ex parte Bransford, 310 U. S. 354.

words "or territory" after its eleven words "state" and (b) to construe the words "district court of the United States" not in their strict historical meaning as a constitutional court but to expand the phrase broadly to include territorial courts.

Particularly I disagree with this court's interpretation of the phrase "such suit" of the terminal clause of Section 266, cited in the fifth paragraph of its opinion. When the pertinent omitted portions of the section are included, the only questions here for consideration are made clear. That section provides

> "(Judicial Code, section 266, amended.) Same; alleged unconstitutionality of State statutes; appeal to Supreme Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or "by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges; Provided, however, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the

hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: . . .

It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

A. *The word "state" as used in Section 266 should be given a strict interpretation as applying to states in their sovereign capacity and hence not including such Territories as Hawaii and Alaska.*

The phrase "such suit" of the terminal clause of Section 266 refer to suits concerning action of a "state" as that word is used in its preceding eleven phrases:

1. "Statute of a state"
2. "Officers of such state"
3. "Pursuant to the statutes of such state"
4. "To the governor and to the attorney general of the state"
5. "Court of the state having jurisdiction thereof"
6. "Under the laws of such state"
7. "A stay in such state courts"

8. "Such state court"
9. "The Courts of the state"
10. "The attorney general of the state"
11. "The suit in the state courts"

Nothing could be further from a strict construction of these phrases than this court's decision which requires the addition of the words "or territory" to each of them.

Entirely apart from this violation of the rule of strict construction of the Phillips and other cases, supra, the Mann Elkins Act of 1910 (36 Stat. 539 et seq.), in which, in Section 17, Congress created the first functioning of the three-judge court of later Section 266, shows the contrary intent in its phraseology. In Section 17 the word "territory" does not appear. Elsewhere in that Act, in Sections 7, 11 and 12, the word "territory" is used in connection with the word "state" wherever that Act includes a territory within its provisions.

This court's opinion explains its disregard of the rule of strict construction of the Phillips case by stating that "the *mischief*, which Congress sought to remedy by enacting and amending Section 266 of the Judicial Code impends in Hawaii similarly as it does in the States." The Supreme Court disposed to the contrary a similar contention with respect to Section 266 in Ex parte Collins, 277 U. S. 565, 567. There was the same claimed unconstitutional "mischief" in the enforcement by municipal officers of a state statute. It was claimed, as here, that the words officers of a state should be given a broad meaning to include officers of a municipality of *a state*. The contention was rejected by the Supreme Court stating "The suit is not one to restrain 'the enforcement, operation, or execution' of a statute of a State within the meaning of Section 266. That section was intended to embrace a limited class of cases of special importance and requiring special treatment in the interest of the public." It is the action of a state in its *sovereign* capacity and not the action of lesser political subdivisions, such as counties, municipalities, and, here, territories, which lack such sovereign capacity, with which Section 266 is concerned. The Court, at page 567, quotes

and relies upon what Senator Burton said of the amendment to the Commerce Court Act which later became Section 266: "It evidently recognizes the superior degree of consideration and sanction which should be given to a state statute, and prevents hasty interference with the action of a sovereign state." 45 Cong. Rec. 7253.

It is obvious that many municipalities created by state legislatures have a larger population and greater property than the Territory of Hawaii. The mischief of unconstitutional action well could be greater when caused by such municipal officers than that by the territorial officers. Yet, the Supreme Court says (p. 568), "Despite the generality of the language, we think the section must be so construed" that it does not apply to the acts of officers of a state's municipality.

In view of the Phillips case it is unnecessary to review the many cases in which statutes containing the word "state" have been broadly or narrowly construed. A broad construction of the word "state" was given in the early decision of Talbot *v.* Silver Bow County, 139 U. S. 438 (1891), the sole case relied upon in this respect in this court's opinion. There it was held to include the Territory of Montana in a statute giving states the power to assess a tax upon national bank stock.

In contrast, in a strict interpretation of the word "state," is the subsequent decision of Wynne *v.* United States, 217 U. S. 234, 242. There the Supreme Court held that the Territory of Hawaii was not included in the word "state" in a statute (R. S. 5339) providing for jurisdiction in federal courts in cases of murder committed within the "admiralty and maritime jurisdiction of the United States, and outside of the jurisdiction of any particular state." The defendant in that case was tried in this court and found guilty of murder committed on a vessel while at anchor in Honolulu Harbor. The Supreme Court held that under this statute the word "state" did not include the Territory of Hawaii and that the harbor of Honolulu was outside the jurisdiction of any state.

The holding in the Wynne case is of greater significance because it distinguishes the liberal interpretation of the

word "state" in the Silver Bow County case, stating that that decision "was based upon the obvious intent of Congress, looking to the scope and purpose of the act," whereas the Congressional intent of R. S. 5339, providing for the jurisdiction of this particular territorial court, is given a strict interpretation of the word "state" as excluding the Territory of Hawaii.

In accord with the decision of Ex parte Collins that section 266 is confined to unconstitutional actions by states in their sovereign capacities and does not include the action of lesser political subdivisions, such as distant island territories, is the decision of the First Circuit in Benedicto *v.* West Indian & Panama Telegraph Co., 256 Fed. 417. There the court held that Section 266 has no application to the issuance of an interlocutory injunction restraining the enforcement upon constitutional grounds of an order of the Public Service Commission of Puerto Rico. The reasoning of the court is that the maintenance of the relationship of the states, as "independent sovereignties," to the United States is the purpose of this legislation. As stated by the court at page 419,

> "We think the leading idea of Congress was in deference to the supposed independent jurisdiction of states, as such, and to safeguard their laws against hasty and inconsiderate federal interference."

Again quoting the court at page 419,

> ". . . we think the provision in respect to three judges (Section 266) has reference to state statutes and Constitutions, because of the independent and peculiar relationship of the states to the federal government, and not to Porto Rico, and because the administration there of the three-judge provision would be locally inconvenient and practically inapplicable, and because it is not clear that Congress intended that interlocutory injunction questions should require the presence of three judges in primary equity proceedings in that Island."

B. *The strict construction of the Phillips case requires the words of Section 266 "district court of the United*

States" to be confined to constitutional district courts in the states and not to be liberally extended to include territorial district courts.

This court's opinion contends that because Congress in 48 U. S. C. 642 has given the district court of the Territory of Hawaii the same jurisdiction and powers as the constitutional courts in the states, the two classes of courts are in all respects identical. It ignores the contention, and cases supporting it, vigorously presented to us by the brief of the Bar Association of Hawaii,[4] that such identity of jurisdiction and powers does not make a territorial court a constitutional court.

Even in the absence of the established strict construction for Section 266 and considering the question de novo, the phrase "district courts of the United States" *without an addition expressing a wider connotation* does not include territorial courts.

Mookini *v.* United States, 303 U. S. 201, 205, was decided thirteen years after Congress enacted the present terminal clause of Section 266 upon which this court bases its opinion. There the question was whether the territorial court of Hawaii is included in the term "district courts of the United States". The Supreme Court held it was not, stating

> "The term 'District Courts of the United States,' as used in the rules, *without an addition expressing a wider connotation*, has its historic significance. It describes the constitutional courts created under Article III of the Constitution. Courts of the Territories are legislative courts, properly speaking, and are not District Courts of the United States. We have often held that vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United

[4] The court requested the Bar Association to act as amicus curiae and brief for us the law with respect to the applicability of Section 266 to the territorial district courts. In response a very able brief was prepared and presented to us by the Association's president Mr. J. Russell Cades, and Mr. Edward Z. Buck. The brief, which covered much more of the historical development of Section 266 than does this dissent, has been of great assistance to its writer, who agrees with the argument and conclusions of these friends of the court.

States does not make it a 'District Court of the United States.' Reynolds *v.* United States, 98 U. S. 145, 154; The City of Panama, 101 U. S. 453, 460; In re Mills, 135 U. S. 263, 268; McAllister *v.* United States, 141 U. S. 174, 182, 183; Stephens *v.* Cherokee Nation, 174 U. S. 445, 476, 477; Summers *v.* United States, 231 U. S. 92, 101, 102; United States *v.* Burroughs, 289 U. S. 159, 163 . . ."

So also of the Territory of Alaska. In its Enabling Act of 1884 the Alaska district court was given "the civil and criminal jurisdiction of district courts of the United States." One McAllister, appointed to the Alaska district court by and with the consent of the Senate was removed by President Cleveland under a statute (R. S. 1768) giving him the power to suspend any civil officer so appointed "except judges of the courts of the United States." McAllister sued for his salary claiming that he remained in office because the district court of the Alaska territory is one of "the courts of the United States," from which he could not be so suspended by the President. In McAllister *v.* United States, 141 U. S. 174, the Supreme Court denied him his salary. It held that, although the Alaska court was "invested with the powers of a district court and a circuit court of the United States, as well as with general jurisdiction to enforce in Alaska the laws of Oregon" (p. 179), it was not one of the "courts of the United States" since that phrase was used in Section 1768 "with reference to the recognized distinction between courts of the United States and merely territorial or legislative courts" (p. 185).

This court of three judges should have held that Section 266 gave it no power to proceed with the instant litigation. The case should have been tried by a single judge as in the case of Farrington *v.* Tokushige, 273 U. S. 284, where a similar Hawaiian school law was held unconstitutional. While the question of jurisdiction of the single judge was not raised in that case, I am of the opinion that no error of the Supreme Court in that regard lurked in its record.

Since the court's decision, at least for the time being, is the law of the case, I am required by the Ayrshire case,

supra, to participate in the adjudication of the merits of the challenge of the constitutionality of the territorial statute.

(S.) WILLIAM DENMAN,
United States Circuit Judge.

APPENDIX V

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT AND TERRITORY OF HAWAII

CIVIL ACTION

Civil No. 765

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, an Eleemosynary Corporation, WAH CHAN THOM, WILFRED CHONG, and LEONG NGET CHO, *Plaintiffs,*

vs.

INGRAM M. STAINBACK, NILS C. TAVARES, and W. H. LOPER, *Defendants*

Before Denman, Circuit Judge, and McCormick and Metzger, District Judges

Attorney for Plaintiffs: Rhoda V. Lewis, Acting Attorney General, Iolani Palace, Honolulu, Hawaii; Thomas W. Flynn, Deputy Attorney General, Iolani Palace, Honolulu, Hawaii.

Attorney for Defendants: W. Y. Char, Bishop National Bank Bldg., Honolulu, Hawaii; A. L. Wirin, Suite 416 Douglas Building, 257 South Spring Street, Los Angeles, California.

DENMAN, *Circuit Judge:*

Plaintiffs seek a judgment declaring unconstitutional Act 104 of the Hawaiian Legislature enacted on May 1, 1943,

entitled "An act regulating the teaching of languages to children," now embodied in Hawaiian Rev. Law, Chapter 31. They also seek to enjoin the defendants Superintendent of Public Instruction, the Governor and the Attorney General from their enforcement of that Act.

Two of the plaintiffs are Wah Chan Thom, a Hawaiian citizen of Chinese ancestry, having three children in the public schools of Hawaii, one 13 years of age and in the seventh grade, one eight years of age and in the third grade, and one three years of age, and Wilfred Chong, of the same citizenship and ancestry, having a child of thirteen in the sixth grade and one of nine in the third grade, and one of five attending kindergarten. They seek to have their children taught the Chinese language without the restrictions imposed by the challenged Act.

The remaining plaintiffs are a teacher of the Chinese language, Leong Nget Cho, a Hawaiian citizen, and the three Hawaiian eleemosynary corporations chartered to teach and seeking to teach the Chinese language.

The evidence adduced establishes that each of the corporation plaintiffs has a matter in controversy exceeding, exclusive of interest and costs, the sum of $3,000 required by 28 U. S. C. 41 (1). As to the other plaintiffs the amended complaint has no statement as to the amount in controversy. The court sua sponte notes that the jurisdictional amount of sec. 41 (1) is required of all civil suits litigating constitutional questions except those stated in the succeeding 27 paragraphs. No one of these gives the district courts jurisdiction of a deprivation of a right created by a *territorial* law, though paragraph (14) gives such jurisdiction to such a deprivation by a state law.[5] It thus seems that Congress

[5] "(14) Suits to redress deprivation of civil rights. Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, *or usage of any State*, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United

intends that a territorial invasion of the right in controversy involving less than $3,000 should have its litigation in the territorial courts.

We will therefore be required to dismiss the complaint as to the plaintiffs the teacher of Chinese and the parents and children, unless within twenty days herefrom the complaint be amended to contain allegations of the required jurisdictional amounts in controversy.

The striking provision of the Act is the extraordinary definition of what constitutes a school in which a foreign language is taught. Section 1872 provides,

> "Definitions. As used in this chapter: 'School' means any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice."

The Hawaiian statute prohibits the teaching of any language other than English in such manner to *all* children who have not passed the first four grades of public or private attendance. Such attendance is required in the school year after the child has reached six years of age. (Haw. Rev.

States. (Mar. 3, 1911, ch. 231, sec. 24, par. 14, 36 Stat. 1092)." (Emphasis supplied.)

Paragraph 1 of Civil Rights Act of April 20, 1871, 17 Stat. 13, in which the right is confined to an invasion by a statute of a *state* only. When codified in 1878 in the Revised Statute, sec. 1979, the form in which it is now cast in 8 U.S.C. 43, the right was redefined as including territorial statutes. However, even under the Revised Statutes the *jurisdiction* was specifically restricted to suits on *state* statutes. District Courts, R.S. 563, par. twelfth, Circuit Courts 629, par. sixteenth.

In this respect it also should be noted that the Supreme Court in Douglas v. Jeanette, 319 U. S. 157, 161, involving only a state statute, after stating the $3,000 amount need not be alleged or proved, cites R.S., sec. 1979, 8 U.S.C. 43, containing the words "or territory," as if the mere creation of the right conferred the jurisdiction. However, the Court finally places the jurisdiction on Section 41 (14) which does not contain the word territory.

L. Sec. 1830.) This means that no parent may have his child so taught before he has attended any public school and thereafter up to ten years of age at least. It is up to a later age if for sickness or some other reason he has not then passed the fourth grade. Thereafter the child must pass *each* succeeding grade through the eighth with a score "not lower than the normal" or reach the age of fifteen before he may so be taught a foreign language.[6]

Since the testimony is that a very large number of Hawaiian children of fifteen seek their own living and support at that age, it is apparent that as to most of them their parents must have taught them a foreign language before that time if one is to be acquired.

Defendants claim that we should not construe the definition of a school as applying to a Chinese speaking mother who daily teaches her two children the language of the home. Assuming this true, it certainly would apply to a religious Chinese descended mother having an educated cousin teach two of her children in her home the truths of Confucius, even orally, explaining the words of that spiritual guide in the language in which they are spoken and are recorded.

The parents' right to have their offspring taught a foreign language is one of the fundamental rights guaranteed by the due process clause of the Fifth and Fourteenth Amendments. A teacher of such languages in a Nebraska public school to children in the eighth grade or below cannot be deprived by the state legislature of the right to pursue that vocation. Meyer *v.* Nebraska, 262 U. S. 390, 400. The Supreme Court reversed a judgment denying an injunction restraining state officials from enforcing the above Nebraska

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[6] "Sec. 1873. Requirements for pupil. No child shall be taught a foreign language in any school unless he shall comply with one of the following requirements: (a) That he shall have passed the fourth grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the department of public instruction attaining a score not lower than normal for his grade; or (b) that he shall have passed the eighth grade in public school or its equivalent; or (c) that he shall have attained the age of fifteen years. (L. 1943, c. 104, s. 3.)"

law against such a teacher. Nebraska District *v.* McKelvie sub. nom. Bartels *v.* Iowa, 262 U. S. 404, 411.

The Circuit Court of Appeals for the Ninth Circuit held that an injunction should be granted against the enforcement of a Hawaiian statute regulating foreign language schools. In so doing it based its opinion on the following statement of the natural law of the relationship of parent and child from an opinion of Mr. Justice Harlan in Berea College *v.* Kentucky, 211 U. S. 45, 67, 68.

> "'The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its use may not be forbidden or interfered with by government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperil the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property, especially, where the serves are rendered for compensation. But, even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States. This court has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces "the right of the citizen to be free in the enjoyment of all his faculties," and "to be free to use them in all lawful ways," . . . If pupils, of whatever race —certainly, if they be citizens—choose with the consent of their parents or voluntarily to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether federal or state, can legally forbid their coming together, or being together temporarily for such innocent purpose.'"

Farrington *v.* Tokushige, 11 F. 2d 710, 713, 714. On certiorari the Supreme Court, 273 U. S. 2, 84, sustained that decision, stating (pages 298, 299),

> ". . . Enforcement of the Act probably would destroy most, if not all of them (the schools); and, cer-

tainly it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue. . . .

The general doctrine touching rights guaranteed by the Fourteenth Amendment to owners, parents and children in respect of attendance upon schools has been announced in recent opinions. Meyer *v.* Nebraska, 262 U. S. 390; Bartels *v.* Iowa, id. 404; Pierce *v.* Society of Sisters, 268 U. S. 510. While that amendment declares that no *State* shall 'deprive any person of life, liberty or property without due process of law,' the inhibition of the Fifth Amendment—'no person shall . . . be deprived of life, liberty or property without due process of law'—applies to the federal government and agencies set up by Congress for the government of the Territory. Those fundamental rights of the individual which the cited cases declared were protected by the Fourteenth Amendment from infringement by the States, are guaranteed by the Fifth Amendment against action by the Territorial Legislature or officers."

Pierce *v.* Society of Sisters, 268 U. S. 510, so relied upon in the Farrington case, sustained an injunction against enforcement of an Oregon statute forbidding the general education of children in Catholic schools. In granting such an injunction to such a school corporation the Court stated at page 535,

". . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Appellees are corporations and therefore; it is said,

they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. Northwestern Life Ins. Co. *v.* Riggs, 203 U. S. 243, 255; Western Turf Association *v.* Greenberg, 204, U. S. 363. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. Truax *v.* Raich, 239 U. S. 33; Truax *v.* Corrigan, 257 U. S. 312; Terrace *v.* Thompson, 263 U. S. 197.

The courts of the State have not construed the Act, and we must determine its meaning for ourselves . . ."

As in the case last cited, the Territorial courts of Hawaii, as the Oregon courts in the Society of Sisters case, "have not construed (the language school) Act, and we must determine its meaning for ourselves." It should be noted, however, that to the fundamental *parental right* to secure for a child a foreign language so recognized in the Berea College and the Society of Sisters cases—that is in the American isolationist period between 1909 and 1926—in today's world of the United Nations there has been added an equally profound *international need* for understanding between the peoples of a world of different tongues.

The defendants contend that in so construing the Hawaiian Act it must be done in the light of the Act's legislative finding concerning a harmful condition respecting the "average" Hawaiian school child. In this connection the case of Farrington *v.* Tokushige, supra, recognizes, at page 299, that exceptional language conditions prevail among Hawaiian children, warranting their pedagogical control within the limits of the Constitution. The legislative finding relating to the "average" of Hawaiian children is as follows:

"Sec. 1871. Declaration of legislative findings. It is hereby declared that the study and persistent use of foreign languages by children of *average* intelligence

in their early and formative years definitely detract from their ability properly to understand and assimilate their normal studies in the English language, which are required by law to be pursued by all children of school age, and definitely retard their progress in understanding and assimilating such studies; that the study and persistent use of such foreign languages in such early and formative years may and do, in many cases, cause serious emotional disturbances, conflicts and maladjustments; that the teaching of foreign languages compels and encourages the study and persistent use of such foreign languages, to the detriment, as aforesaid, of children in their early and formative years; that it is to the best interest, and will best promote the health and welfare, of children of tender age that such foreign language studies not be undertaken until each child shall have completed and passed at least the fourth grade or shall have attained the age of nine years, unless such child is earlier able to speak, write and read the English language and has attained a test score of at least 5.0 on standard tests in composition and in reading; and that the teaching and study of foreign language to and including the eighth grade or the age of fifteen years should be regulated in the public interest to avoid the detrimental results herein set forth to which end each of the provisions of this chapter are enacted. (L. 1943, c. 104, s. 1.)"

This finding regarding such "average" children is supported by the evidence. In brief, it is that in many instances Hawaiian children are required to frame their thoughts and to express them in three distinct languages. One is the language of the home, where a child, say of Portuguese parents, has all his intimate home activities in Portuguese. Another is what is called "pidgin," an extension of that lingua franca of the China, South Asiatic and Malayan coast cities in which the foreign residents conduct their personal and commercial relations with the lesser educated resident nationals. To this the Hawaiian people have added words and phrases assimilated from the Portuguese,

Hawaiian, Koreans and others. The testimony is that much of the intercommunication of children from homes where a foreign language is spoken is in this pidgin and that even some teachers use it in clarifying English words to their pupils. The third language is English.

With many of the children so using the three languages, the testimony of the defendants is that there is in the sixth grade a retardation in accomplishment of the school's curriculum of over six months behind that of similar schools on the mainland. The parties dispute as to the major cause causans. Plaintiffs, while not contesting the retardation, contend that pidgin and not the language schools is the principal cause. Defendants claim it is because of the language schools.

There are many Hawaiian Catholic parochial schools with complete educational courses, attendance in which is an equivalent to that of the regular public schools. The defendants state the Act interdicts the teaching of even Latin or Greek to the children of the age and scholastic standing it seeks to affect, and we agree.

Before the attack on Pearl Harbor there were large schools teaching the Chinese and Japanese languages in the afternoon, after the regular schools had adjourned. These schools ceased teaching during the war. There is testimony that all of such Japanese schools have been permanently abandoned. Their buildings were voluntarily turned over to the government or charity organizations. The Chinese school plaintiffs now seek to resume such late afternoon teaching.

The extent of the education of children in the Chinese language prior to the war with Japan is shown by the admission of the defendants' answer that there were eight such schools employing more than fifty teachers. It is a proper inference that the three plaintiff schools seeking to resume teaching will have many pupils of above the average intelligence of the legislative finding.

The Act with its finding and prohibitory provisions shows on its face a denial of the right to acquire a foreign language to that half, or nearly half, of Hawaiian children of more than "average intelligence." Reinforcing this is the testi-

mony of defendants' principal pedagogical expert that some children from homes speaking a foreign language "are so far behind the others that if our teachers are to have a chance to bring them up to standard, up to standard of the mainland, they can't have the additional handicap of trying to learn another language or else they will never—or else too many of them will never speak good English. *Of course, the bright ones will.* But the children who are about the average, *about half of the children in any group are below average*, so they can't do it with that . . ." (Emphasis supplied.)

In Hawaii there were 22,357 children in the first four grades. Construing the word "average" in its customary meaning as being derived from those above and below a standard, of these at least 10,000 above average intelligence, the brighter ones, are denied the right then to begin to acquire a foreign language even with a tutor at home.

We do not agree with the defendants that such a denial to the parents of such a large proportion of children of the constitutional right to secure a foreign language for them is warranted to secure the elimination of the harm it seeks to avoid for those of lesser ability. It is for the brighter ones that there is the greater gain in such attainment—a gain not only in personal mental growth and satisfaction and in increased business opportunities but, now, in opportunities in service to his government's need of foreign language experts in its international intercourse.

Where such a fundamental right is destroyed by statute, it is not incumbent upon the wronged party to show that it could have been drawn so as to prevent the evil sought to be cured in the conduct of others. Thornhill *v.* Alabama, 310 U. S. 88, 99, and cases there cited. Hence we are not required to explore the area of legislation in which pedagogical standards may be created by which these children of average and less than average intelligence could be segregated from the others and such prohibitory restraint applied to them.

While it is apparent that the three plaintiff schools will have pupils of above such average intelligence and hence would be deprived of their constitutional right, its funda-

mental character gives them the right to contest the legislation even if they were not shown to be about to teach such pupils. It is enough that the statute shows on its face such an invalid deprivation. Thornhill *v.* Alabama, supra 101; Lovell *v.* Griffin, 303 U. S. 444, 452; Smith *v.* Cahoon, 283 U. S. 553, 562; Schneider *v.* State, 308 U. S. 147, 161.

There is no merit in defendants' contention that under the saving clause of the statute [7] it is inapplicable to plaintiffs or that it contemplates an enforcement only against children of average intelligence. It applies to *all* persons systematically teaching two pupils and to *all* children as well as those of average or less than average intelligence. Its provisions are not divisible in either of these essential respects.

We hold and declare the statute to violate the due process clause of the Fifth Amendment and order the issuance of the injunction prayed for.

(S.) WILLIAM DENMAN,
United States Circuit Judge.
(S.) PAUL J. McCORMICK,
United States District Judge.
(S.) DELBERT E. METZGER,
United States District Judge.

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[7] "Section 7. (Saving Clause.) If any portion of this Act, or the application thereof to any person or circumstance, shall be held to be unconstitutional or invalid, the remainder of this Act, or the application of such portion to other persons and circumstances, shall not be affected."

APPENDIX VI

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT AND TERRITORY OF HAWAII

CIVIL ACTION

Civil No. 765

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, an Eleemosynary Corporation, WAH CHAN THOM, WILFRED CHONG and LEONG NGET CHO, *Plaintiffs*,

vs.

INGRAM M. STAINBACK, WALTER D. ACKERMAN, JR., and W. H. LOPER, *Defendants*

Assignment of Errors

Rhoda V. Lewis, Assistant Attorney General, Territory of Hawaii; Thomas W. Flynn, Deputy Attorney General, Territory of Hawaii, Attorneys for Defendants.

To the District Court of the United States in and for the District and Territory of Hawaii.

Come now INGRAM M. STAINBACK, WALTER D. ACKERMAN, JR. and W. H. LOPER, each individually and respectively as Governor of the Territory of Hawaii, Attorney General of the Territory of Hawaii and Superintendent of Public Instruction of the Territory of Hawaii, who are the defendants in the above entitled cause, and in connection with their appeal to the Supreme Court of the United States from the final amended judgment of the District Court of the United States in and for the District and Territory of Hawaii, entered the 13th day of February 1948, jointly and severally make and file the following assignment of errors upon which they will rely in their prosecution of the said appeal from the said judgment, and say that in the record, proceedings, and judgment therein, manifest error has in-

terfered, to the prejudice of said defendants as follows, to-wit:

1. The court erred in denying defendants' motion to dismiss.

2. The court erred in overruling defendants' "Defenses in Law."

3. The court erred in denying defendants' motion to strike plaintiffs' supplemental pleading.

4. The court erred in holding that the complaint sufficiently alleged that as to each of the plaintiffs Mo Hock Ke Lok Po, Dai Kung Chinese School, and Chung Shan Chinese School Association (hereinafter called the plaintiff school corporations), the matter in controversy exclusive of interest and costs exceeded $3,000.

5. The court erred in holding that the plaintiff school corporations, or any of them, had made sufficient showing that the matter in controversy exclusive of interest and costs exceeded $3,000.

6. The court erred in finding and deciding that by virtue of the passage of Act 104 of the Session Laws of Hawaii 1943, Chapter 31 of the Revised Laws of Hawaii 1945 (hereinafter called the statute), and its enforcement as threatened by defendants, each of the plaintiff school corporations will be irreparably damaged in an amount in excess of $3,000 or any other amount.

7. The court erred in holding that the complaint stated a claim for injunctive relief against the enforcement of the statute.

8. The court erred in permanently enjoining said defendants from enforcing or attempting to enforce the statute against the plaintiff school corporations and Leong Nget Cho, or any of them.

9. The court erred in adjudicating and declaring the rights of the plaintiffs there being no right to declaratory relief when the case was not a proper one for equitable relief.

10. The court erred in placing its own construction on the statute when the courts of the Territory of Hawaii had not construed the statute nor had an opportunity to do so, and there were easy and ample means for determining the issues of territorial law in the courts of the Territory of Hawaii.

11. The court erred in failing to confine its consideration to the case or controversy presented by the intended application of the statute by the defendants under their interpretation thereof.

12. The court erred in failing to confine its consideration to the case or controversy presented by the pleadings, and in considering hypothetical cases.

13. The court erred in holding that the hypothetical case of the tutoring of two or more children in the home in the doctrines of Confucius was to be considered, and that the supposed case of such tutoring was not divisible from the case presented by the plaintiff school corporations.

14. The court erred in failing to presume the statute constitutional.

15. The court erred in failing to so construe the statute as to sustain its constitutionality.

16. The court erred in failing to give due weight to the findings made by the legislature in the statute.

17. The court erred in failing to give due weight to the legislature's prerogative of resolving a conflict of opinion as to the harmful effects of bilingual instruction of very young children (children who have not yet passed the fourth grade or its equivalent) in English and Oriental languages.

18. The court erred in failing to give due weight to the existence of peculiar language problems in the Territory of Hawaii which are detrimental to the accomplishment by the Territory of its objective of universal education in the basic school studies.

19. The court erred in failing to give due weight to the relation of the Territory of Hawaii to the children of said Territory, as parens patriae.

20. The court erred in failing to give due consideration to the powers of the Territory of Hawaii to protect the health and welfare of the children in said Territory.

21. The court erred in holding the statute unconstitutional, and at the same time holding it to be unnecessary to decide or pass upon plaintiffs' contention that the legislature of Hawaii has no power to deny to any child the right to acquire a foreign language in his infancy.

22. The court erred in failing to give due weight to the reasonableness of the statutory requirements in the light of the facts.

23. The court erred in failing to give due weight to the evidence of prevailing educational practices in the Territory of Hawaii and throughout the world.

24. The court erred in interpreting the legislative findings contained in the statute as findings relating to the mean average of children, to-wit, half the children of the Territory of Hawaii in the first four grades of school.

25. The court erred in failing to give due weight to the findings of the legislature, contained in the statute, as constituting findings relating to all children in the Territory of Hawaii in their early and formative years, except those of unusual intelligence who even before passing the fourth grade are so clearly proficient in the English language as to attain a test score of at least 5.0 on standard tests in composition and in reading.

26. The court erred in failing to find that in the Territory of Hawaii, save in exceptional cases, bilingual instruction of very young children (children who have not yet passed the fourth grade or its equivalent), in English and Oriental languages, materially interferes with the accomplishment of their education in the basic school studies, and with their health and welfare.

27. In the face of conflicting evidence as to the interference of bilingual instruction of very young children (children who have not yet passed the fourth grade or its

equivalent), in English and Oriental languages, with the accomplishment of their education in the basic school studies, and with their health and welfare, plaintiffs having produced evidence in an endeavor to show that there is no such interference save in exceptional cases, and defendants having produced evidence in an endeavor to show that there is such interference save in exceptional cases, the court erred in finding such interference in one half of the cases, this being a finding unsupported by the plaintiffs' evidence or the defendants' evidence.

And such error amounted to a failure to resolve the conflict in the evidence.

28. The court erred in finding and deciding that of 22,357 children in the first four grades, at least 10,000 are of such intelligence that the learning of a foreign language prior to passing of the fourth grade will cause no detriment to them in their general education, their health, or otherwise.

29. The court erred in finding and deciding that of 22,357 children in the first four grades, at least 10,000 are of such intelligence that there is no pedagogical or other reason why they should be prohibited from being taught Chinese in the plaintiffs' schools.

30. The court having erroneously found and decided that approximately 10,000 out of 22,357 children in the first four grades are of such intelligence that the learning of a foreign language prior to passing of the fourth grade will cause no detriment to them, further erred:

In failing to consider and give due weight to the fact that plaintiff school corporations offer no instruction in the basic school studies and hence the supposed group of 10,000 children could not secure a complete education by attendance at their schools.

In assuming without evidence thereof that this supposed group of 10,000 children could be instructed in the basic school studies, in the public schools and in private schools offering such basic school studies, without detrimental interference arising from the necessity of

also instructing in the basic school studies the remaining 12,357 children who, even under the court's erroneous finding, are handicapped by bilingual instruction in the first four grades.

In finding and deciding that the parents of the supposed group of 10,000 children of superior intelligence were deprived by the statute of their right to have them taught a foreign language, it being erroneous to assume that their supposedly superior intelligence would not equally ameliorate the supposed burden of the statutory requirements.

31. The court erred in holding that the statute deprives the parents of more than 10,000 children of their right to have them taught a foreign language, the reasonable regulations of the statute not constituting a deprivation of such right, assuming without conceding that the rights of parents were entitled to be considered.

32. The court erred in passing upon the constitutionality of the statute in the light of the rights of parents, when it had held that presence of the jurisdictional amount in controversy was necessary to consideration of such rights.

33. It was error for the court to make any finding concerning, or to consider, the alleged rights of parents who were not parties to the cause, or the alleged rights of the plaintiff parents WAH-CHAN THOM and WILFRED CHONG, who were dismissed from the action.

34. The court erred in adjudging the statute unconstitutional as to the plaintiff school corporations without considering the extent of actual interference in the conduct of schools by said corporations which enforcement of the statute would cause.

35. The court erred in making findings and conclusions as to the rights of children, there being no children before the court as parties to the cause.

36. The court erred in holding the statute wholly unconstitutional.

37. The court erred in failing to separately pass upon the reasonableness of the following statutory requirements, and in failing to consider each as divisible from the others:

(a) The requirement that a teacher of a foreign language to a child under the age of fifteen shall demonstrate that he is reasonably well versed in the usage and idiom of such foreign language.

(b) The requirement that a teacher of a foreign language to a child under the age of fifteen shall demonstrate that he is reasonably well versed in the usage and idiom of the English language.

(c) The requirement that a student under the age of fifteen, in order to undertake the study of a foreign language, shall have passed the fourth grade in public school or an equivalent course of study.

(d) The requirement that students under the age of fifteen who have not yet passed the eighth grade and who are studying or about to undertake the study of a foreign language, may be required to demonstrate, by a standard test as defined in the statute, that they have such proficiency in English as must be attained by other students in the same grade in order to pass in English studies.

And the court erred in failing to uphold as constitutional each and every of the foregoing statutory requirements.

38. The court erred in permanently enjoining defendants from interfering with the teaching by the plaintiff school corporations and LEONG NGET CHO, or any of them, of foreign languages on the ground or grounds:

That the pupils being taught have or have not passed any grade in the public schools or its equivalent;

That the pupils being taught have or have not passed any tests in English composition or reading;

That the pupils being taught are or are not of certain age.

And as to each of the said matters it constituted error for the court to so enjoin the defendants.

39. The court erred in permanently enjoining defendants from interfering with the teaching by plaintiff school corporations and LEONG NGET CHO, or any of them, of foreign languages on the ground that any teacher teaching foreign languages has not been examined or certified by a Board of Examiners.

40. The court erred in holding that the plaintiff school corporations are entitled to teach foreign languages in their schools to students:

Regardless of whether said students have or have not passed any grade in the public schools or its equivalent.

Regardless of whether said students have or have not passed any tests in English composition or reading.

Regardless of the age of said students.

And as to each of the said matters it constituted error for the court to so hold.

41. The court erred in holding that the plaintiff school corporations are entitled to hire to teach foreign languages to their students, regardless of age, teachers who have not been examined or certified by a Board of Examiners:

As to their versatility in the usage or idiom of the English language.

As to their versatility in the usage or idiom of the foreign language to be taught.

And as to each of said matters it constituted error for the court to so hold.

42. The court erred in holding that the plaintiff LEONG NGET CHO, is entitled to follow his profession as a teacher of foreign languages and teach children regardless of their age without having been examined or certified by a Board of Examiners:

As to his versatility in the usage or idiom of the English language.

As to his versatility in the usage or idiom of the foreign language to be taught.

And as to each of the said matters it constituted error for the court to so hold.

43. The court erred in finding and deciding that the plaintiff LEONG NGET CHO was able to secure a contract to teach Chinese at the Chinese language school owned by the plaintiff CHUNG SHAN CHINESE SCHOOL ASSOCIATION in 1943, there being no evidence thereof.

WHEREFORE, the said defendants pray that the said judgment and decree of the District Court be reversed with directions to dismiss the amended complaint filed in this cause.

Dated at Honolulu, Territory of Hawaii, this — day of April, 1948

Respectfully submitted,

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No. 52

Supreme Court of the United States

October Term, 1948

INGRAM M. STAINBACK, Governor of the Territory of Hawaii, WALTER D. ACKERMAN, JR., Attorney General of the Territory of Hawaii, and W. H. LOPER, Superintendent of Public Instruction of the Territory of Hawaii,

Appellants,

vs.

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, et al,

Appellees.

Upon Appeal from the District Court of the United States for the District of Hawaii

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No. 52

Supreme Court of the United States

October Term, 1948

INGRAM M. STAINBACK, Governor of the Territory of Hawaii, WALTER D. ACKERMAN, JR., Attorney General of the Territory of Hawaii, and W. H. LOPER, Superintendent of Public Instruction of the Territory of Hawaii,

Appellants,

vs.

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, et al,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII

Brief for Appellants

THE OPINIONS BELOW

Three opinions were rendered by a specially constituted three-judge District Court for the District of Hawaii. The opinion granting an injunction as prayed

for is reported in 74 F. Supp. 852. The majority opinion of the three-judge court regarding applicability of section 266 of the Judicial Code in the Territory of Hawaii (formerly 28 U.S.C. 380, now Title 28 U.S. Code, sections 1253, 2101, 2281 and 2284) is reported in 74 F. Supp. 852 at page 858. The dissenting opinion of the three-judge court on this question is reported in 74 F. Supp. 852 at page 861.

The order of the single United States district judge denying a preliminary injunction, which order included findings of fact and conclusions of law, is not reported but will be found in the printed record at page 47.

JURISDICTION

There was presented to a three-judge district court in Hawaii federal issues as to alleged deprivation of liberty and property without due process of law under the Fifth Amendment, and alleged deprivation of rights protected by the Civil Rights Act (8 U.S.C.A. 41-43). The three-judge court found that the territorial statute, Act 104 of the Session Laws of Hawaii 1943, now chapter 31 of the Revised Laws of Hawaii 1945 (Appendix I) violated the constitutional rights of appellees (plaintiff school corporations and a teacher of Chinese language), and granted an injunction against enforcement of the Act. Pursuant to section 266 of the Judicial Code as amended (formerly 28 U.S.C. 380, now sections 1253, 2101, 2281 and 2284 of Title 28 U.S. Code), and section 238 of the Judicial Code as amended (28 U.S.C. 345, now repealed), direct appeal to this Court was taken by the appellants on April 16, 1948 from the final amended judgment of the three-judge court made and entered February 13, 1948 (R. 77). This Court, by order entered June 1,

1948, after reciting that the statement of jurisdiction had been considered, postponed further consideration of the question of the jurisdiction of this Court to the hearing of the case on the merits (R. 597).

In addition to the procedure of taking a direct appeal to this Court as described above, appellants likewise noted and perfected their appeal to the United States Court of Appeals for the Ninth Circuit (R. 591-595).[1] Appellants have further petitioned this Honorable Court to grant certiorari to the Ninth Circuit Court of Appeals, before judgment, pursuant to section 1254(a) of Title 28, U.S. Code, formerly section 240(a) of the Judicial Code (28 U.S.C. 347(a)). This petition requests that the Court consider it in conjunction with the direct appeal to this Court. Appellants respectfully show unto this Honorable Court that the record, briefs and arguments in connection with the direct appeal are identical with, and might be treated as, the record, briefs and arguments upon the return of certiorari, the application being similar, as to procedure, to that in *Ex Parte Quirin*, 317 U.S. 1.

The jurisdiction of the three-judge court, and the appellate jurisdiction in this case, are reviewed in Point I of this brief. We submit that this Court should entertain the case upon one or the other of the procedures submitted, that is:

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[1]This appeal was taken April 16, 1948, which was sixty days after the final amended judgment, entered February 13, 1948, the governing law then allowing three months for appeal. The amendment of Rule 73 having taken effect on March 19, 1948, the court, pursuant to stipulation, entered an order under Rule 86(b) so as to make the former procedure applicable to the taking of the appeal (R. 592-593).

(a) This Court should sustain the jurisdiction of the three-judge court and the direct appeal to this Court; or

(b) In the event this Court does not sustain the jurisdiction of the three-judge court, or holds that at the time in question there was no direct appeal to this Court from a court in Hawaii[1] then this Court should grant certiorari to the Court of Appeals (in which the appeal then would lie), before judgment.

We submit that the novelty of the procedural questions involved justifies the alternative application above presented, this Court being assured that once it has determined the applicability of the three-judge court procedure in Hawaii, the dilemma now presented will not arise again.

STATEMENT OF THE CASE

This case involves the validity of an entire statute of the Territory of Hawaii, Act 104 of the Session Laws of Hawaii 1943, now chapter 31 of the Revised Laws of Hawaii 1945, Appendix I. The entire statute is involved inasmuch as the statute as a whole was declared unconstitutional by the three-judge district court (R. 77 and 113). Briefly stated, this statute seeks to defer bilingual courses of study until a child has passed the fourth grade.

The original bill of complaint was filed by the appellee school corporations only (R. 3). It alleged that enforcement of the statute would deprive the school corporations of their liberty and property without due

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[1]Prior to enactment of Title 28 of the U.S. Code, Hawaii was subject to a special law governing appeals from the district court, reviewed infra, Point I.

process of law, and would deprive them of the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments of the Constitution, and prayed for injunctive relief, both temporary and permanent. Application for a temporary or preliminary injunction was heard by a single United States district judge, and denied (R. 47). It was assumed for the purposes of this ruling that section 266 was inapplicable, neither side then contending that it was applicable.

Subsequently "defenses in law", contained in the answer filed by appellants (R. 20), were set for hearing before trial (R. 50-51), together with a motion to dismiss the complaint (R. 51-52). The defenses in law were overruled and the motion to dismiss denied by a single United States district judge (R. 116, 457). This judge then decided to convene a three-judge court, but no order to that effect was entered until the three-judge court itself, by a majority of two, one judge dissenting, ruled on its jurisdiction (R. 117-118, 87-101).

When the three-judge court convened for trial of the question on the merits (R. 135), an amended complaint was filed, joining as additional plaintiffs (appellees), two parents of prospective pupils of the school corporations, and the plaintiff teacher (R. 56). The amended complaint sought both injunctive and declaratory relief and relied on the Civil Rights Act, 8 U.S.C., sections 41-43, and on the Fifth Amendment of the Constitution. It prayed for a three-judge court, which was a prayer not contained in the original complaint. It repeated the prayer of the original complaint for injunction pendente lite, but this application was not renewed by motion or in any way pressed before the three-judge court.

Defendants filed an answer to the amended complaint (R. 64) again setting up defenses in law, and answering the averments of the amended complaint. This answer, as had the original answer, further averred (R. 72-76) that the simultaneous pursuit at too early an age of intensive study of dissimilar languages, particularly when the foreign languages are as dissimilar from English as are the oriental languages, adversely affects the attaining of proficiency in either language, causes emotional disturbances, contributes to the deficiency in English—the medium of instruction in the basic school studies—which is a serious problem in the schools of the Territory, and conflicts with the acquisition by children of their education in the basic studies, all of which is contrary to the health and welfare of the children concerned; further, that it is not necessary to the learning of a foreign language that a child undertake a course of study therein earlier than the fifth grade.

At the trial evidence was produced for and against said averments. Furthermore, by stipulation, all proceedings and evidence previously had and adduced on the hearing of the defenses in law and the motion to dismiss were considered the same as though brought before the three-judge court (R. 76).

On February 11, 1948, the three-judge court filed its amended findings of fact and conclusions of law (R. 109), and made and entered its amended judgment (R. 113), based on its opinion of October 22, 1947 (R. 77). It dismissed the complaint as to the two plaintiff parents on jurisdictional grounds, and granted an injunction in favor of the appellee school corporations and the appellee teacher of Chinese.

The amended judgment decreed that appellee school corporations were entitled to teach foreign languages in their schools to students, regardless of whether said students have or have not passed any grade in the public schools or its equivalent, and enjoined appellants from enforcing or attempting to enforce against said appellee school corporations and appellee teacher, the provisions of the aforesaid statute, Appendix I.

SPECIFICATION OF ERRORS

The three-judge District Court in Hawaii is in error in this case in that:

1. The court erred in holding that as to each of the plaintiff-appellee school corporations, the matter in controversy exceeds $3,000. exclusive of interest and costs (Assignments of Error 3-6 and 34, R. 123, 127, argued Point II, *infra*).

2. The court erred in failing to dismiss the action for failure of the complaint to state a claim for equitable or other relief (Assignments of Error 1, 2, 7-9, R. 123, 124, argued Point III, *infra*).

3. The court erred in placing its decision upon the basis of its own construction of the statute, which had not theretofore been construed by the courts of the Territory, and in failing to dispose of the primary issue as to the power of the legislature to enact such a statute, leaving questions as to the form of the statute to be disposed of by the territorial courts (Assignments of Error 10, 15, and 21, R. 124, 125, argued Point IV and parts D and E of Point V, *infra*).

4. The court erred in considering hypothetical cases and in failing to confine its consideration to the case or cases presented by the pleadings and the in-

tended application of the statute by defendant-appellants. (Assignments of Error 11, 12 and 13, R. 124, argued Point IV, *infra.*)

5. The court erred in failing to sustain the statute as based upon facts bringing it within the legislature's prerogatives under the police power, as parens patriae (Assignments of Error 14-29, 31, 34, 38, 40, R. 124-129, argued Point V, parts A and E, *infra.*)

6. The court erred in failing to apply the usual presumptions of constitutionality, and in failing to sustain the legislative findings as supported by sufficient evidence, irrespective of a conflict in the evidence (Assignments of Error 14-17, R. 124-125, argued Point V, parts B and C, *infra.*)

7. The court erred in interpreting the legislative findings as findings relating to only half the children in the first four grades of school. (Assignments of Error 15, 24-25, R. 124-125, argued Point V, part D, *infra.*)

8. In the face of conflicting evidence as to the interference with the accomplishment of education in the basic school studies and with the health and welfare of children resulting from bilingual instruction of very young children in English and Oriental languages, plaintiff-appellees' witnesses having denied that the normal child suffers such interference, and defendant-appellants' witnesses having testified that such interference exists in all but exceptional instances, it was error for the court to find that in at least 10,000 out of 22,357 cases there is no such interference, this being a finding drawing a line at an arbitrary point, not supported by the evidence on either side. (Assignments of Error 27-29, R. 126, argued Point V, part D, *infra.*)

9. The court erred in holding that the statute deprives parents of the right to have their children taught a foreign language and deprives the plaintiff-appellees of their right to so teach such children, the reasonable regulations of the statute not constituting a deprivation of such rights (Assignments of Error 15, 22, 31, 34, R. 125, 127, argued Point V, part E, *infra*).

10. The court erred in holding the statute wholly unconstitutional and in failing to separately consider each of four severable requirements contained in the statute (Assignments of Error 36-37, 39, 41-42, R. 127-129, argued Point V, part E, *infra.*)

11. The court erred in finding and deciding that plaintiff-appellee Leong Nget Cho was able to secure a contract to teach Chinese at the school owned by the plaintiff-appellee Chung Shan Chinese School Association in 1943, there being no evidence thereof. (Assignment of Error 43, R. 129-130, submitted as not requiring argument).

SUMMARY OF ARGUMENT

Defendant-appellants' argument first considers the jurisdiction of the three-judge court, as such, and the appellate jurisdiction of this Court, admitting that grave doubts exist as to the right of direct appeal to this Court, but urging that if the direct appeal does not lie, then the appeal taken to the Court of Appeals for the Ninth Circuit does lie, and that in such event, this Court entertain the case upon the petition for certiorari to the Court of Appeals before judgment, which also is pending in this Court. This is Point I of the argument.

The argument then proceeds to take up the specification of errors. In Point II the jurisdiction of the

court is considered in relation to the amount in controversy, and it is submitted that the plaintiff-appellee school corporations failed to show that as to each of them the matter in controversy exceeds $3,000, exclusive of interest and costs. This point covers Assignments of Error 3-6 and 34; Specification of Error No. 1.

In Point III it is submitted that plaintiff-appellees failed to state a cause of action for equitable relief or for declaratory relief, and that defendant-appellants' motion to dismiss should have been granted. This point covers Assignments of Error 1, 2, and 7-9; Specification of Error No. 2.

Point IV analyzes the opinion of the lower court, showing that invalidation of the territorial statute was in contravention of the doctrine of deference to local courts in the interpretation of their own statutes, the companion doctrine of abstention in deciding on the constitutionality of statutes, and the case and controversy rule. This point covers Assignments of Error 10-13, 15, and 21; Specifications of Error Nos. 3 and 4.

Point V is directed to the merits of the case. We submit that the statute represents an exercise of the police power within the legislature's prerogatives. The argument covers Assignments of Error 14-29, 31, 34, and 36-42. Part A of Point V submits that the statute represents an exercise of the Territory's power as parens patriae, in the same field as the compulsory education laws, being directed to the prevention or minimization of the handicap to a child in his accomplishment of education in the basic school studies, imposed by too early simultaneous study of English and oriental languages. This part covers Specification of Error No. 5.

In parts B and C of Point V we submit that, the statute being for the protection of children from a handicap put upon them by too early bilingual instruction, the Territory has the power to protect the children from this handicap even though the parents may favor such early bilingual instruction, and the clear and present danger rule does not apply in the present case any more than it applied in *Prince* v. *Massachusetts*, 321 U.S. 158; that although there was a conflict in expert opinion as to the harmfulness of simultaneous study of English and oriental languages by extremely young children, it was for the legislature, not the courts, to resolve this conflict, under the usual rules of presumption of constitutionality. These parts cover Specification of Error No. 6.

Further analyzing the lower court's opinion and its findings, and in further support of Specification of Error No. 3 as well as in support of Specification of Error No. 7, we submit in Part D of Point V that the legislature made findings referring to the general run of children, that the statute is free from the defect created in it by the construction put by the lower court upon the words "children of average intelligence" used in one place in the legislative findings, which the lower court divorced from the context and from the statute as a whole, interpreted to mean "children of mean average intelligence", and thereby attributed to the legislature the intent to cover in its findings only half of the area covered by the general body of the statute.

Part D of Point V further shows that the testimony of the witnesses on both sides related to the general run of children, not to one half of the children divided by the line of mean average intelligence; therefore,

the court's finding that in at least 10,000 out of 22,357 cases there is no interference with the accomplishment of education in the basic school studies resultant from bilingual instruction of very young children in English and oriental languages, is not supported by the testimony on either side, but on the contrary draws a line at an arbitrary point selected by the court. This part of the argument covers Specification of Error No. 8.

Part E of Point V submits argument to show that the burdens imposed by the statute on schools and parents are negligible, and that such slight restrictions are fully justified by the need to relieve the children of the Territory from the handicap put upon them by too early bilingual studies. This part of the argument is in further support of Specification of Error No. 5, and covers Specification of Error No. 9.

In further support of Specification of Error No. 3 we also submit in part E of Point V that the requirements of the statute, when properly interpreted, are reasonably directed to meet the evil found by the legislature and upon which the statute is based, hence that the statute meets the tests of constitutionality on this score as well, but if our interpretation of the statute is disputed by plaintiff-appellees, then the correctness of the interpretation is a matter that properly should be tried in an enforcement proceeding brought in a territorial equity court. Thus as submitted in Specification of Error No. 3 the primary issue in the case, which the lower court failed to dispose of, is whether or not the territorial legislature was within its constitutional powers when it sought to defer simultaneous instruction in English and Chinese to a point (fixed at the completion of the fourth grade) when English is suf-

ficiently mastered to enable the child to undertake, without injurious results, intensive study of Chinese in a school devoted to that purpose.

Part E of Point V further submits that there are four severable requirements contained in the statute, one of which is not even challenged. The statute cannot be invalidated as a whole; invalidation of any one of the four requirements would not invalidate any of the others. This part of the argument covers Specification of Error No. 10.

ARGUMENT

I. Jurisdiction of the Three-Judge Court; Appellate Jurisdiction

Appellants admit that grave doubts exist as to the right to direct appeal to this Court; this was conceded in their jurisdictional statement. If the direct appeal does not lie then the appeal taken to the Court of Appeals for the Ninth Circuit does lie, and in that event we urge this Court to entertain the case upon the pending petition for certiorari to the Court of Appeals before judgment.

If the direct appeal does not lie it will be on one or more of three issues below reviewed: (1) whether the case in any event was a proper one for a three-judge

court; (2) whether under the law governing this case a direct appeal to this Court could be had from any court in Hawaii: and (3) whether section 266 of the Judicial Code was adopted and made applicable to the United States District Court for the District of Hawaii by the Hawaiian Organic Act.

The below discussion of these three issues includes and supplements the material in part K of Appellants' jurisdictional statement previously filed to which no further reference will be necessary.

(1) WHETHER THE CASE IN ANY EVENT WAS A PROPER ONE FOR A THREE-JUDGE COURT.

Since the application for a preliminary injunction was disposed of by a single judge in the original complaint (R. 47), and not renewed before the three-judge court on the amended complaint, other than by a prayer for such relief (R. 56, 63), which was not pressed before such three-judge court, the case then being set for final hearing (R. 136), the question arises whether, irrespective of the question of applicability of section 266 in the Territory of Hawaii (on which the members of the three-judge court differed) the case in any event was a proper one for a three-judge court. *Moore* v. *Fidelity and Deposit Co.*, 272 U.S. 317; *Smith* v. *Wilson*, 273 U.S. 388; *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U.S. 10; *Healy* v. *Ratta*, 289 U.S. 701; *McCart* v. *Indianapolis Water Co.*, 302 U.S. 419, 420. This proposition has apparently been rendered of no importance under the revised Title 28 of the United States Code, section 2281 of which provides for a three-judge court whether or not an interlocutory injunction is sought. We urge the Court not to rest its decision on this ground alone.

(2) WHETHER UNDER THE LAW GOVERNING THIS CASE A DIRECT APPEAL TO THIS COURT COULD BE HAD FROM ANY COURT IN HAWAII.

Section 128 of the Judicial Code (28 U.S.C.A. 225) provided that the circuit courts of appeal should have appellate jurisdiction to review final decisions in the United States District Court for Hawaii in all cases. This was in contradistinction to their appellate jurisdiction over district courts generally, which did not lie where a direct review of the decision might be had in this Court under section 238 of the Judicial Code (28 U.S.C.A. 345). This distinction was made by the Act of February 13, 1925, 43 Stat. 936, c. 229, which also provided in section 13 for repeal of "so much of the Hawaiian Organic Act, as amended by the Act of July 9, 1921, as permits a direct review by the Supreme Court of cases in the courts in Hawaii." Previously, since 1909, section 86 of the Hawaiian Organic Act had contained a specific provision that "appeals may be taken to the Supreme Court of the United States from said district court in cases where appeals are allowed from the district courts of the United States to the Supreme Court * * *" (35 Stat. 838; 42 Stat. 119).

The question arises whether the Act of February 13, 1925 required that the appeal in this case be taken to the circuit court of appeals, rendering inapplicable in any event that part of section 266 which provided for direct review, irrespective of the applicability of that part of section 266 which provided for a three-judge court. Appellants took a direct appeal to this Court on the assumption that the holding by the trial court was that all of section 266 applied.

The question above submitted does not arise under the revised Title 28 of the United States Code, section 1291 of which places appellate jurisdiction over the district court for Hawaii on the same basis as any district court, the special and different provision for Hawaii having been eliminated. Therefore if the three-judge court procedure is applicable in Hawaii (part (3) infra) a direct appeal will lie in subsequent cases, if not this one. In the present case the matter in any event can be entertained by issuance by this Court of certiorari before judgment.

(3) WHETHER SECTION 266 OF THE JUDICIAL CODE WAS ADOPTED AND MADE APPLICABLE TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII BY THE HAWAIIAN ORGANIC ACT.

Section 86 of the Hawaiian Organic Act (48 U.S.C.A. 641-642, 643-645, Appendix II), at all times since its original enactment (31 Stat. 141, c. 339) has provided, and still with slightly different wording,[1] provides, that:

> "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."
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> 48 U.S.C.A. 645, Appendix II

Said section 86, prior to the enactment of Title 28 of the United States Code and when this case was decided below, also provided that the laws relating to juris-

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[1] Infra, p. 22.

diction of district courts of the United States and the manner in which they proceed should govern the court created by said section 86 (48 U.S.C.A. 642, Appendix II). This part of section 86 was deleted upon the enactment of Title 28 of the United States Code for reasons below set forth.

In general terms section 5 of the Hawaiian Organic Act (48 U.S.C.A. 495) provided and still provides that: "The Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; * * *".

When this case was decided by the district court the applicability of section 266 of the Judicial Code turned on the question whether it was such a law as was adopted by the provisions of sections 5 and 86 of the Hawaiian Organic Act, above set forth. We submit that it was such a law, and that Congress by its treatment of the United States District Court for the District of Hawaii in enacting Title 28 of the United States Code has spelled out its previous adoption by reference, thereby demonstrating its understanding that it created this court, albeit a legislative court, with the same jurisdiction and procedure in all respects, including that at issue, as constitutional district courts. This is more fully developed below.

One of the purposes of section 266 of the Judicial Code was to make interference by interlocutory injunction with state legislation a matter for the adequate hearing and full deliberation which a court composed of three judges is likely to secure. *Stratton* v. *St. Louis*

Ry. Co., supra.[2] The statute sought "procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy." *Phillips* v. *United States*, 312 U.S. 246 (1941). The statute therefore was based upon avoidance of needless friction with state policies, hence was based on the same principle which leads the federal courts to defer to the final authority of a state court to interpret statutes of the state. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). This court has said that the federal district courts are to defer to the territorial courts in such matters *De Castro* v. *Board of Commissioners*, 322 U.S. 451, 459 (1944), discussed *infra*, Point IV.

That Congress intended to establish in the Territory of Hawaii, between the federal court created by the Hawaiian Organic Act and the system of territorial courts then existing and substantially by that act perpetuated, the relation which exists between the courts of the United States and the state courts in the various states, was held soon after the enactment of the Hawaiian Organic Act. *Wilder's S. S. Co.* v. *Hind*, 108 Fed. 113, 114-115 (C.C.A. 9th, 1901), aff'd 183 U.S. 545. This principle became established in a series of cases holding that the federal rule against interference by habeas corpus with the proceedings of state courts is equally applicable in the Territory of Hawaii. *In re Marshall*, 1 U.S.D.C.Haw. 34 (1900); *In re Atcherley*, 3 U.S.D.C.Haw. 404, 421 (1909); *Soga* v. *Jarrett*, 3 U.S.D.C.Haw. 502, 506 (1910); *In re Curran*, 4 U.S. D.C.Haw. 730, 738 (1916). Other cases relying on the same principle are *United States* v. *Bower*, 4 U.S D.C.Haw. 466; *Yeung* v. *Territory*, 132 F. 2d 374, 378 (C.C.A. 9th, 1942).

[2] 282 U.S. 10

Such judicial pronouncements as to the autonomy of the territorial system of courts in Hawaii are confirmed by the legislative history of the Hawaiian Organic Act. Hawaiian Commission Message, Sen. Doc. No. 16, 55th Cong., 3d Sess., pp. 162-164; H. R. Rep. No. 305, p. 19, of Committee on Judiciary on H. R. 2972, 56th Cong., 1st Sess., which bill was later incorporated by the House into Sen. 222, the Hawaiian Organic Act (see H. R. Rep. No. 549, 56th Cong., 1st Sess.); 33 Cong. Rec. 1871, 1929, 1932-1934, 2025, 2123-2124, 2133, 2189, 2191-2194, 2388-2389, 2397, 2398-2400, 2441, 3771, 3801, 3859, 4358, 4649, 4733. The autonomy of the territorial courts is part of the congressional scheme for the territorial government, which it created as a sovereign government, none the less so because Congress may intervene in its affairs.[1]

This Court has said that an adoptive statute, such as the section of the Organic Act above quoted, embraces subsequent changes in the law adopted "that are not obviously inapplicable". *Balzac* v. *Porto Rico*, 258 U.S. 298, 302 (1922); to the same effect, *In re Maret*, 145 F. 2d 431, 436, note 28 (C.C.A. 3d 1944); cf. *Mookini* v. *United States*, 303 U.S. 201, 205. The law on this subject is examined in 2 Sutherland on Statutory Construction, 3d ed. secs. 5207-5208, pp. 547-551; 168 A.L.R. 627 (1947). Adoptive statutes are classified as of general or specific reference, the former referring to the law of a subject generally, and

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[1] Supporting the sovereignty and autonomy of the territorial government are: *Kawananakoa* v. *Polyblank*, 205 U.S. 349, 353; 33 Cong. Rec. 1871, 1929, 1932-1934, 2025, 2123-2124, 2133, 2189, 2191-2194, 2388-2389, 2398-2400, 2441.

including all amendments and modifications of that law subsequently enacted. The adoptive provisions of the Organic Act are of this general reference type; cf. specific reference statute considered in *Hassett* v. *Welch*, 303 U.S. 303, 314 (1938).

The principles governing adoptive statutes perhaps were overlooked in the Puerto Rico cases relating to three-judge courts.[4] In any event the Puerto Rico insular courts do not have the same historical autonomous position as do the courts of the Territory of Hawaii.

Section 266 of the Judicial Code, though appropriate to Hawaii in its purpose to avoid hasty and ill con-

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[4] *Porto Rico Light & Power Co.* v. *Colom*, 106 F.2d 345 (C.C.A. 1st 1939), cert. denied 308 U.S. 617. *Benedicto* v. *West India & Panama Telegraph Co.*, 256 Fed. 417 (C.C.A. 1st 1919). *Munoz* v. *Porto Rico Light & Power Co.*, 83 F.2d 262 (C.C.A. 1st 1936), cert. denied 298 U.S. 689, the Circuit Court of Appeals citing *Kendall* v. *United States*, 12 Pet. 524, 625, and *In re Heath*, 144 U.S. 92, but not *Balzac* v. *Porto Rico*, *supra*. The *Kendall* case seems to have assumed that the principle governing adoption of laws of other jurisdictions (e.g., British) also governed the adoption of laws of the same jurisdiction, overlooking the competence of a legislative body to state its general intent that all future laws enacted by it in a given field shall apply to the matter before it. Not until the *Balzac* case in 1922 and *Panama R.R.Co.* v. *Johnson*, 264 U.S. 375, 391, decided in 1924, was the true nature of a general reference statute recognized. The last cited case concerned a general reference statute which has been held to incorporate later amendments: *Chisholm* v. *Cherokee-Seminole S.S.Corp.*, 36 F.Supp. 967 (D.C.S.D.N.Y. 1940); *Gahling* v. *Colabee S.S.Co.*, 37 F.Supp. 759 (D.C.E.D. Pa. 1941); *Streeter* v. *Great Lakes Transit Corp.*, 49 F.Supp. 466 (D.C.W.D.N.Y. 1942).

sidered interference with respect to statutes of the Territory, possibly was rendered partially inappropriate in Hawaii by the Act of February 13, 1925 repealing "so much of the Hawaiian Organic Act *** as permits a direct review by the Supreme Court of cases in the courts in Hawaii" (par. 2, *supra*). But even if a direct review was not allowable under the law governing this case, the provision for a three-judge court still was appropriate. Review by a Circuit Court of Appeals of a decision of a three-judge court is not unheard of. *Healy* v. *Ratta*, 67 F.2d 554 (C.C.A. 1st 1933), reviewed 292 U.S. 263; *Wilentz* v. *Sovereign Camp*, 306 U.S. 573 (1939); *Phillips* v. *United States*, 312 U.S. 246, 254; cf. *Query* v. *United States*, 316 U.S. 486. In *Smith* v. *Wilson*, *supra*,[1] this court left open the possibility that it is not erroneous for three judges to sit even when the appeal must be to the Circuit Court of Appeals. In Hawaii a three-judge court apparently is the method provided for review of an order of the Interstate Commerce Commission, pursuant to the Act of October 22, 1913, 38 Stat. 220, c. 32, abolishing the Commerce Court (now sections 1253, 1336, 2101, 2284, 2321-2325 of Title 28 of the U. S. Code), yet an appeal to the Circuit Court of Appeals may have been required by the 1925 Act, *supra*, prior to enactment of Title 28 of the United States Code.

The treatment of the United States District Court for the District of Hawaii in the revision of Title 28 of the United States Code enacted by Public 773, 80th Cong., 2d Sess., c. 646, sustains the applicability of the three-judge court procedure in the Territory of Hawaii. That a legislative body's interpretation of its own laws

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[1] 273 U.S. 388

is a direction to courts in expounding the provisions of the law, was early held by this Court. *Alexander* v. *Alexandria*, 5 Cranch 1, 3 L. Ed. 19. The rule is that if a subsequent act on the same subject affords a complete demonstration of the legislative sense of its own language the subsequent act should be incorporated into the former act.[6]

Public Law 773 which enacted the new Title 28 of the United States Code as section 1 of that Act provides in section 8 that section 86 of the Hawaiian Organic Act is amended to read as follows:

"Sec. 86. The laws of the United States relating to removal of causes, appeals and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

All mention of the establishment of a United States district court for Hawaii and of its jurisdiction and procedure has been thereby eliminated from section 86. This was done because the new Title 28 includes Hawaii as a judicial district in which a United States district court is created in the same manner as all other United States district courts. It therefore was no longer necessary to provide for the creation of this district court in the Hawaiian Organic Act or to direct this district court to follow the procedure and jurisdiction of other district courts.

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[6]See also: *Koshkonong* v. *Burton*, 104 U.S. 668, at pp. 678-679; *First National Bank* v. *Missouri*, 263 U.S. 640, 658; *United States* v. *Bowling*, 256 U.S. 484; 2 Sutherland Statutory Construction (3d ed.) sec. 5110, p. 526.

In recommending this significant change to Congress, the House of Representatives Judiciary Committee in its Report No. 308, 80th Cong., 1st Sess., dated April 25, 1947, in explanation of the bill, H. R. 3214, states:

"Hawaii and Puerto Rico are included as judicial districts of the United States, since in matters of jurisdiction, powers, and procedure, they are in all respects equal to other United States district courts. See sections 91 and 119."

The Congress itself thereby recognized that in its earlier law creating the United States District Courts for the District of Hawaii it had adopted, by reference, the general statutes concerning the powers and procedures of district courts; and in this new enactment Congress spelled out the adoption, assimilating the United States District Court for the District of Hawaii into the genus of district courts.[1] As has been pointed out,[2] the former policy of Congress concerning direct appeal to this Court from Hawaii has been reversed by the reinstitution of provision for direct appeal from

[1] The new Title 28, chapter 5, provides that Hawaii constitutes one judicial district (section 91). Section 132 creates in each judicial district a court which shall be a court of record known as the United States District Court for such district. Chapter 21, being general provisions relating to all courts, opens with section 451, which contains definitions for the whole of Title 28. The United States District Court for the District of Hawaii is specifically included in said section in the term "court of the United States"; the terms "district court" and "district court of the United States" mean the courts constituted by chapter 5 of this Title.

[2] Supra, p. 16.

the district court in Hawaii in the same manner as from any other district court.

Another particularly noteworthy elimination of a difference which formerly existed between the District Court for Hawaii and other district courts, results from the repeal of the Act of August 24, 1937, 50 Stat. 751. Section 5 of that act defined "court of the United States" so as to specifically include all courts of record of Hawaii as courts of the United States, district courts of the United States being separately listed in the definition, with evident reference to the constitutional district courts. This was a deviation from the usual practice; the section 5 definition made section 1 of the 1937 act, relating to intervention by the United States, applicable to the territorial courts, which usually have been treated by Congress as if they were state courts. The section 5 definition apparently made section 3 of the 1937 act (section 380a of the former Title 28) relating to three-judge courts for the granting of injunctions restraining the enforcement of acts of Congress, not applicable in the District Court for Hawaii.[9]

The new definition of "court of the United States"[10] causes section 2403, relating to intervention by the

[9] The adoptive provisions of the Hawaiian Organic Act would have caused this section to apply were it not for the lumping of all courts of record of Hawaii into one class (section 5 of the 1937 act), contrary to the usual practice of segregating territorial courts from the District Court for Hawaii. This treatment mitigated against the applicability of section 3 of the 1937 act (section 380a of the former Title 28), just as the background of the Rules of Civil Procedure mitigated against their applicability in Hawaii (*Mookini* v. *United States*, *supra*, 303 U.S. 201, 205) until they were made applicable by a special statute.

[10] Section 451 of the new Title 28.

United States, not to apply in the territorial courts, thereby restoring the usual practice. The new definition, taken with the definition of "district court",[11] causes section 2282, relating to three-judge courts for the granting of injunctions restraining the enforcement of acts of Congress, to apply in the District Court for Hawaii. Hence, Congress does not consider that distance is an obstacle to the convening of a three-judge court in Hawaii.[12] Another example of a three-judge court in Hawaii occurs under section 2325 of the new Title 28, relating to injunctions restraining the enforcement of orders of the Interstate Commerce Commission. Likewise the new provisions concerning three-judge courts contained in sections 2281 and 2284 apply to the district court for Hawaii as a "district court of the United States" by statutory definition. Hence it no longer is necessary for a court to decide the appropriateness to the District Court for Hawaii of the provisions governing the constitutional courts. The

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[11]Section 451 of the new Title 28.

[12]The general doctrine enunciated in *Phillips* v. *United States*, *supra*, 312 U.S. 246 (1941), was that section 266 of the Judicial Code (section 380 of the former Title 28, here involved) should be construed to avoid "a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice." These principles were applied to the district court in Hawaii by the dissenting judge in the three-judge district court below as reasons why section 266 was not deemed to have been adopted by Congress to govern procedure in the district court in Hawaii. The new Title 28 shows that the desire of Congress to avoid serious drain on the federal judicial system was overemphasized by the dissenting judge.

District Court for Hawaii remains a legislative court[11] but Congress has so exercised its legislative powers in the new Title 28 as to resolve for the future all questions concerning the applicability to this court of statutes governing district courts generally.

The only issue which Congress did not specifically settle by the enactment of the new Title 28 is whether or not the Territory of Hawaii was included in the word "state" as used in the new Title 28. That Congress necessarily included the Territory within the word "state" throughout the new Title 28, follows from the fact that otherwise there would be glaring omissions in the statutory provisions for the District Court for Hawaii and notable differences between it and other district courts in jurisdiction, powers and procedure. But as already shown,[12] the District Court for Hawaii was intended to be in all respects equal to other district courts and in the new Title 28 Congress eliminated such differences as formerly existed between them.

To exemplify the use of the word "state" in the new Title 28 as including "territory":

Among the general procedural provisions of the new Title 28, section 1652 requires district courts to regard the laws of the several *states* as rules of decision in civil actions in cases where they apply. As section 725 of the former Title 28 has always applied in Hawaii and without such provision the court would be hopelessly at sea, it is apparent that "territory" must be included in the word "state" in the new section. In section 2410 provision is made for the

[11] *Mookini v. United States, supra*, 303 U.S. 201.
[12] Supra, p. 23.

foreclosure of liens on property on which the United States has or claims a lien. Such foreclosure suit may be brought in any district court or "state court". The revisers' notes show particular awareness of the applicability of this section in Hawaii, yet it was not felt necessary to define the word "state" to include "territory".

In section 1343, as below noted,[15] two of the three paragraphs describe the scope of the jurisdiction thereby conferred by referring to section 47 of Title 8, which specifically applies in the territories, yet the third paragraph of section 1343 continues to use the word "state", undoubtedly on the assumption that it includes "territory", that word being specifically included in such laws as section 43 of Title 8, to which the third paragraph of section 1343 generally (but not by citation of the statute in this instance) refers.

Other examples are given in the footnote.[16]

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[15]Infra, p. 31.

[16]It is provided in section 1348 that national banking associations shall be deemed citizens of the states in which they are respectively located; section 1861 excludes from jury service persons incompetent to serve in state courts; section 1961 makes the levy of execution for the collection of interest on judgments a matter dependent on state law; section 1962 makes the extent of judgment liens dependent on state law; section 2005 makes the appraisal of goods taken on execution dependent on state law; section 2007 abolishes imprisonment for debt where abolished by state law (in the case of the Territory of Hawaii imprisonment for debt was abolished by section 10 of the Hawaiian Organic Act, 48 U.S.C.A. 501). In all such provisions the word "state" must have been intended to include "territory".

Chapter 89 of the new Title 28, section 1441 et seq., concerning removal of causes, has not been cited in the

The only definition of the word "state" found in the new Title 28 is in section 1332, providing for jurisdiction of district courts based on diversity of citizenship. Here a specific definition of "State" as including Territories and the District of Columbia was advisable because of the provisions of the Constitution, Article III, section 2, concerning diversity of citizenship. Congress no doubt thought it desirable to make it clear that it was using the word "state" in a broader sense than that word was used in the constitutional provision. The existence of an earlier statute[17] defining the word "state" for diversity of citizenship purposes made it important to include a definition in this part of the code; otherwise the repeal of the 1940 Act[18] might have

foregoing examples because, irrespective of the meaning of the word "state" therein, there exist in section 86 of the Hawaiian Organic Act (48 U.S.C.A. 645, Appendix II) as amended by Public 773, 80th Cong., 2d Sess., enacting the new Title 28, provisions adopting such removal provisions by reference. Hence the applicability of the removal provisions does not depend on the meaning of the word "state". Many other laws, which relate to the relations between the courts of the United States and the courts of the several states have been omitted from the examples given, for the same reason. We deem sections 2281 and 2284, relating to three-judge courts, to be laws which relate to the relations between the courts of the United States and the courts of the several states.

It is the usage of the word "state" as including "territory" even in the sections of the new Title 28 not covered by the adoption provisions contained in the amended section 86 of the Hawaiian Organic Act, that we consider particularly noteworthy.

[17] Act of April 20, 1940, 54 Stat. 143, c. 117.

[18] It was repealed by the act enacting the new Title 28.

indicated an intent to narrow the meaning of the word "state" for diversity of citizenship purposes.

This Court has found no difficulty in rejecting the contention that the phrase "laws of the state" in an act of Congress should be limited to the forty-eight states, where the consequence would have been that there was no provision for the method of inflicting the death penalty when imposed by a district court sitting in a territory. *Andres* v. *United States*, 333 U.S. 740, decided April 26, 1948. The court stated "in many contexts 'state' may mean only the several states of the United States. Here, however, we hold that its meaning includes the Territory of Hawaii."

It is submitted that this Court should hold that when this case was decided by the three-judge district court, section 266 of the Judicial Code had been adopted to govern the United States District Court for the District of Hawaii by general reference in the Hawaiian Organic Act, and that Congress by its treatment of the United States District Court for the District of Hawaii in the new Title 28 of the United States Code has recognized its earlier adoption by reference of procedural statutes such as section 266. The use of the word "state" in sections 2281 and 2284, the relevant provisions in the new Title 28, interposes no obstacle.

II. Jurisdiction Considered in Relation to the Amount in Controversy; the Appellee School Corporations Failed to Show that as to Each of Them the Matter in Controversy Exceeds $3,000, Exclusive of Interest and Costs.

(This point covers Assignments of Error 3-6, and 34; Specification of Error No. 1.)

Preliminarily the Court may wish to review on its own motion the lower court's ruling as to the necessity of establishing a jurisdictional amount.

It is beyond question that the plaintiff school corporations must establish a jurisdictional amount, under the rule of *Hague* v. *C.I.O.*, 307 U.S. 496, at p. 514. As to the appellee school teacher, Leong Nget Cho, it was stipulated that the jurisdictional amount was established (R. 101). But the court below dismissed the action as to the two parents, Wah Chan Thom and Wilfred Chong, because of lack of proof of the jurisdictional amount; they are not appellants here, yet because of what we feel was a lack of consistency in the lower court's decision, we call to this Court's attention that the lower court, by a majority of two, deemed section 266 of the Judicial Code applicable in the Territory, notwithstanding the use therein of the word "state", but held that paragraph 14 of section 41, former Title 28 of the U.S. Code (section 1343(3) of the newly enacted Title 28) did not apply because of the use therein of the word "state".

This construction of paragraph 14 of section 41 of the former Title 28 was not followed in *Alesna* v. *Rice*, decided by the District Court for Hawaii, a single judge sitting, 74 F. Supp. 865, appeal pending in the Court of Appeals for the Ninth Circuit; in the *Alesna* case both the Territory and the petitioner took the position that paragraph 14 of section 41 of the former Title 28 did apply in the Territory of Hawaii, and in the present case the holding that it did not apply was on the court's own motion. The only other case coming to our attention in which section 41(14) of the former Title 28 has been considered in a territory is *Insular Police Commission* v. *Lopez*, 160 F. 2d 673 (C.A. 1st 1947)

cert. den. 331 U.S. 855; this case gives some support to the opinion of the lower court in the instant case.

The dismissed plaintiffs were joined as parties by an amended complaint, in which they relied upon 8 U.S.C., section 43, as well as other provisions. Said section 43 of Title 8, U.S.C., does include the word "territory", although paragraph 14 of section 41 of the former Title 28 did not. In the newly enacted Title 28 the comparable section 1343, while not specifically mentioning the word "territory", does contain two paragraphs, (1) and (2), which relate to the action for damages allowed by section 47 of Title 8, where the word "Territory" specifically is included. However, paragraph (3) of said section 1343 of the new Title 28 resembles the former paragraph (14), of section 41 of the old Title 28.

For the convenience of the Court we are including as Appendix III of this brief the legislative history of section 43 of Title 8 of the U.S. Code and of section 41 (14) of the former Title 28, which was in effect when this case was decided below. Our conclusion is that paragraph 14 of section 41 of the former Title 28 did apply in the Territory of Hawaii, as held in *Alesna* v. *Rice, supra.*

As to the appellee school corporations which necessarily must establish the jurisdictional amount, irrespective of the applicability in the Territory of Hawaii of paragraph 14 of section 41 of the former Title 28, U.S. Code, it is submitted that the court erred in finding the jurisdictional amount.

Appellee school corporations introduced evidence, and appellants stipulated to certain facts showing the numbers of pupils in the first four grades of their

schools prior to the close of the schools in December 1941, and showed further the amounts of money received as tuition fees from such pupils (R. 430, 457-461, 465, 466.). These figures cannot be regarded as evidence of loss or damage, as the mere reading of the law indicates that in no sense will the first four grades of the school be eliminated, and that it is entirely possible and even probable that a comparable number of students will be available for attendance in the first four grades, the only difference being that such students will be in attendance in the upper four grades of the public and private schools of the Territory, whereas prior to 1941 many of them would generally have been in the first four grades of their regular schooling. This proposition is substantiated by the fact that as of the time the original complaint in this case was filed all teaching of Chinese language, and all school operations of the appellee corporations, had been suspended for a period of almost exactly five years (R.471, 479). Hence it would be simple for the schools to start their first grade instruction with fifth grade children. This is further substantiated by the testimony of the two parents who had been joined as plaintiffs in the amended complaint, both of whom testified that they had daughters thirteen years of age and in the seventh grade of their regular schooling and these children would have to start in the first grade when the language schools should reopen. (R.172, 191.)

It is well established that in a suit to prevent interference with a business, the measure of the amount in controversy is the value of the right to do business without such interference. *McNutt* v. *General Motors*, 298 U.S. 178. At the outset then, appellees failed to establish any case involving the loss of $3,000, without

affirmatively showing that the first four grades of their schools would actually be eliminated, this being a showing they have not attempted to make except by remote inference.

Similarly, the appellee school corporation alleged that their staffs of teachers would be disorganized by enforcement of the law requiring certification of such teachers by a board of examiners. (R.9, 18-19.) This allegation utterly fails to establish any loss or damage unless it is accompanied by an affirmative showing that no other teachers who could be certified by a board of examiners were available. There was no attempt to make such showing.

III. Appellees Failed to State a Cause of Action for Equitable Relief or for Declaratory Relief; Appellants' Motion to Dismiss Should Have Been Granted.

(This point covers Assignments of Error 1, 2, 7-9; Specification of Error No. 2.)

As noted in Points I and IV hereof, the relationship between the federal court in Hawaii and the territorial courts is, for all practical purposes, identical with that existing in the continental United States between federal courts and state courts.

It is the position of appellants that neither the complaint nor the amended complaint contained allegations sufficient to entitle appellees to injunctive relief. A decisive reason for denying equitable relief lies in the rule that a federal court will not enjoin the enforcement of a state law where the state law itself affords a means of presenting contentions as to unconstitutionality of the statute. The rule was stated

by Mr. Justice Frankfurter in "The Federal Courts", 1929, 58 New Republic 273, 275 and quoted in a note in 43 Harv. L. Rev. at page 378:

> " 'The federal courts entertain jurisdiction in these suits because the states do not provide adequate remedies through their own courts. The legal procedure of the states has not accommodated itself sufficiently to the consequences of their regulatory legislation, so that the validity of new legislation, or the application of old, cannot be questioned in the state courts without running serious risks. The states could prevent interference with their tax collections through suits in the federal courts, by removing any chance for the claim that there is no adequate remedy at law in the state courts, if the tax is paid. So, also, with appropriate changes in the criminal administration of the states, there would be no excuse for seeking injunctions in the federal courts, or claims that the multiplicity of suits causes irreparable damages and oppressive penalties before final settlement, in the state courts, of the validity of contested state action. Congress has already given the states a lead in this direction; but they have not followed it. The states' failure to use their power to sift state legislation in their own courts has needlessly swollen the business of the federal courts, and cast upon the Supreme Court some of its most burdensome labor.' "

This rule is well established both when the state law operates in civil courts and in criminal courts of the state. In *Cavanaugh* v. *Looney*, 248 U.S. 453, involving an action to enjoin state officials from filing condemnation proceedings under an allegedly unconstitutional law, this Court held that all issues could be settled in the state suit, and that the trial court properly denied a preliminary injunction. The case of *Northport Power & Light Co.* v. *Hartley, Governor*

of Washington, 283 U.S. 568, involved an action to enjoin the bringing of a suit to forfeit land on account of alien ownership, under an allegedly unconstitutional statute. It was held that no sufficient grounds for equitable relief were shown, as the rights of the plaintiffs could be protected as well in the state court proceedings.

This Court has often and consistently held that the power of granting injunctive relief against the enforcement of an allegedly unconstitutional state law should not be exercised "unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury." Among the more recent cases restating and emphasizing that principle are the following: *Douglas* v. *Jeannette*, 319 U.S. 157; *Watson* v. *Buck*, 313 U.S. 387; *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, at pp. 95 and 96, holding that the danger of irreparable loss must be both "great and immediate"; *Toomer* v. *Witsell*, 334 U.S. 385 (decided June 7, 1948); *American Federation of Labor* v. *Watson*, 327 U. S. 582. Among the earlier cases are *Terrace* v. *Thomson*, 263 U.S. 197; *Ex parte Young*, 209 U.S. 123; and *Truax* v. *Raich*, 239 U.S. 33.

Examination of these decisions establishes clearly that each case must rest upon its own factual situation, as to whether the circumstances of great and immediate danger of irreparable injury are sufficiently and properly alleged and proved. In the *Truax*, *Terrace* and *Toomer* cases, injunctive relief was granted because there were no sufficient means of testing the validity of the statutes without running great risk of irreparable injury. In the *Douglas* and *Watson* v. *Buck* cases, injunctive relief was denied because there was no such risk.

In the case at bar, appellees have never been faced with any risk except the action of a court of equity (R. 40). The territorial statute provided for its enforcement in a court of equity of the Territory. (Appendix I, s. 6.) The prayer for equitable relief therefore involved the novel, if not anomalous, proposition that one court of equity should enjoin, as an irreparable injury, action in another court of equity.

The appellees could not be endangered in any way as to liberty or property unless and until they were to be enjoined from violating the statute's regulations. Before they could be so enjoined there would be a hearing and a determination of the constitutionality of the statute. The appellees ran no risk of cumulative fines or penalties or forfeiture of any property; yet the presence of some such risk has repeatedly been held a prerequisite to the granting of the relief prayed for and which, we believe erroneously, was granted by the three-judge district court.

The findings and ruling of the single United States district judge in his order denying the preliminary injunction sought by the original complaint, were essentially a dismissal of the action because of failure of appellees to establish a claim for equitable relief, although the court did not at that time do more in its order than deny the application for the preliminary injunction. The order contained these important conclusions of law:

> "6. Federal courts are hesitant to enjoin the enforcement of the laws of a state, and no injunction ought to issue against officers of a state clothed with authority to enforce the law in ques-

tion unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.

7. The law involved carries no criminal penalties for infractions. Enforcement is in equity in the circuit courts of the Territory. Plaintiffs have no reason to fear a court of equity, and there is every reason to believe that their constitutional rights would be fully protected in the equity courts of the Territory and that an appeal, if need be, eventually could be had to the United States Supreme Court."

(R. 49)

Subsequently, the motion to dismiss the original complaint came on for hearing before a single judge, not the same one who heard the application for the preliminary injunction. The motion was based on the "defenses in law" set forth in the answer to the original complaint (R. 21-23). The motion was denied without opinion (R. 116).

The "defenses in law" set forth in the answer to the amended complaint (R. 64-66) were before the three-judge court, to whom the amended complaint and answer thereto were presented.[19] The three-judge court simply adopted as its own the earlier action of the single judge who ruled against dismissal of the action, the parties having stipulated that the proceedings before this single judge should be deemed to have been before the three-judge court (R. 76).

Thus the only one of the judges below who stated any reasons for his ruling as to the adequacy of the

[19]The defenses in law, without a motion, were sufficient to raise the question whether the amended complaint stated a cause of action. (F.R.C.P., Rule 12)

claim for equitable relief was the first judge above quoted (R. 49), and his opinion supported the contentions here made.

The prayer for declaratory relief, having made its first appearance in the amended complaint, was not considered by any of the lower court judges, the three-judge court to which it was first presented having adopted as its own the conclusion that the complaint stated a sufficient claim to equitable relief, hence not having had occasion to consider the sufficiency of the claim to declaratory relief.

Compelling reasons exist for the denial of the prayer for declaratory relief. It is well established that declaratory relief is not an avenue to equitable relief for which there is no sufficient showing: *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, *Spence* v. *Cole*, 137 F.2d 71; *Whisler* v. *City of West Plains*, 137 F.2d 938. Nor is declaratory relief, as the authorities cited in connection with the doctrine of abstention show, an avenue to submission of a hypothetical case. The present case is a clear one for application of the doctrine of abstention (Point IV, *infra*). Actual operation of the schools and actual administration of the statute (which would have obtained had the test of constitutionality come in an enforcement proceeding in the territorial equity court), would have taken out of the case the conjectural aspects which governed the lower court's decision. (Point IV, *infra*.)

We concede that if the schools could not open and operate, and thus subject the statute to the test of constitutionality in a state of actuality, in such event

there would be some basis for declaratory relief, though even so such declaratory relief should be sought in the territorial court (Point IV, *infra*). However, this was not such a case. At no time have the appellee school corporations contended that they could not open their schools at all, under the statute. Obviously they could not so contend. The most that was claimed was that they could not operate the schools the way they wanted to, under the statute. That appellees might readily have opened their schools and operated them the way they wanted to in defiance of the statute, pending adjudication of its validity in an enforcement proceeding in the territorial court, is a decisive answer to the claim for declaratory relief as well as the claim for equitable relief.

They cannot be heard to say that to so open their schools in advance of adjudication of the merits of their contentions would involve them in too great a risk of expense, should the adjudication of the merits entail revision of their operating methods. This is amply demonstrated by their eagerness to obtain a preliminary injunction (R. 16). Such preliminary injunction could not constitute a decision on the merits. In so seeking a preliminary injunction, and in still praying in their amended complaint for an injunction pendente lite (R. 63), they showed their readiness and eagerness to hazard the expense of reopening the schools without any assurance as to whether they ultimately would be obliged to abide by the statute. Reopening of the schools pending test of the statute in an enforcement proceeding in equity in the territorial court would constitute no greater risk.

IV. Invalidation of the Territorial Statute was in Contravention of the Doctrine of Deference to Local Courts in the Interpretation of their Own Statutes, the Companion Doctrine of Abstention in Deciding upon the Constitutionality of Statutes, and the Case and Controversy Rule.

(This point covers Assignments of Error 10-13, 15, and 21; Specifications of Error No. 3 and 4.)

The general rule being that a federal trial court defers to the construction placed on a statute by the court charged with the enforcement of the statute, and judges the constitutionality in the light of that construction, or if the statute has not yet been construed then it will await state court construction before passing on constitutionality,[20] and the courts of the Territory of Hawaii having the same duty of enforcement of territorial statutes as do the courts of a state and holding the same relation to the United States District Court as do the courts of a state,[21] it would follow that the rule of deference to the courts of the Territory in interpretation of territorial statutes should be followed by the United States District Court for the District of Hawaii. Indeed, if that were not the rule the consideration of a case by the Court of Appeals and Supreme Court would vary in accordance with whether the case came up through the territorial courts or came up on appeal from the United States

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[20] *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496; *AFL* v. *Watson*, 327 U.S. 582; *Stephenson* v. *Binford*, 287 U.S. 251, 277; *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101.

[21] Point 1, *supra*.

District Court, and the Court of Appeals and Supreme Court would be in the anomalous position of sustaining a statutory construction in one case because it came up through the territorial courts whose interpretation was not manifestly erroneous,[22] while reversing it in another case because on appeal from the federal court the appellate court undertook to review the statutory construction. The difficulties which this would entail were recognized in *De Castro* v. *Board of Commissioners*, 322 U.S. 451, 459, where this Court held that the federal district court in Puerto Rico was to defer to the local tribunals, where judicial pronouncements of the local tribunals expressed their understanding of matters of local concern. On the authority of the *De Castro* case this Court, in a case arising in Hawaii, *United States* v. *Fullard-Leo*, 331 U.S. 256, 269, again stated that the federal courts were to defer to the decisions of the territorial courts in matters of local law.[23]

No decision has been found specifically concerning the deference to be paid by the United States District Court to the territorial courts with respect to statutes which have not been construed by the territorial courts.

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[22]This would follow from the well-established rule that upon appeal from the highest court of the Territory of Hawaii its construction of territorial statutes will not be disturbed except in case of manifest error. *Waialua Co.* v. *Christian*, 305 U.S. 91, 108; *Ewa Plantation Co.* v. *Wilder*, 289 Fed. 664, 670 (C.A. 9th).

[23]At the same time this Court held that the right of the United States to quiet its title to land claimed by it by virtue of cession from the Republic of Hawaii was a problem of federal law, not exclusively a problem of Hawaiian local law.

But to round out the system established by the decisions above cited, as well as to carry out the direction of Congress that the United States District Court treat the territorial courts as if they were state courts,[24] the District Court necessarily should have the same hesitancy in putting its own construction on a statute and invalidating it on the basis of such construction, as would a federal court sitting in a state.

The doctrine of deference is part and parcel of the doctrine of abstention.[25] The latter doctrine, under which a court will refrain from deciding issues of constitutionality which interpretation of the statute may resolve,[26] is involved in this case. Disregard of the doctrine of abstention, which in some cases is a mere abuse of discretion, in this case goes so far as to violate the case and controversy rule, which governs the justiciability of controversies in a jurisdictional sense.[27]

Whether or not the territorial legislature was within its constitutional powers when it sought to defer simultaneous instruction in English and Chinese to a point (fixed at the completion of the fourth grade) when English is sufficiently mastered to enable the child to undertake, without injurious results, intensive study

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[24]Point I, *supra*.

[25]*AFL* v. *Watson*, 327 U.S. 582, as explained in *Rescue Army* v. *Municipal Court*, 331 U.S. 549, footnote 37 on page 571.

[26]*Musser* v. *Utah*, 333 U.S. 95; *Rescue Army* v. *Municipal Court*, *supra*, 331 U.S. 549, 568; *United States* v. *Petrillo*, 332 U.S. 1, 5; *Federation of Labor* v. *McAdory*, 325 U.S. 450, 460.

[27]*United Public Workers* v. *Mitchell*, 330 U.S. 75, 89, 91; *Rescue Army* v. *Municipal Court*, *supra*, 331 U.S. 549, 570-571.

of Chinese in a school devoted to that purpose, was the primary issue before the court. Secondarily involved was the reasonableness of the qualifications and conditions of the statute, as framed.

The lower court did not decide the primary issue above stated. (R. 112; Con. L. No. 1.) It reviewed the legislative findings contained in the statute and said that defendants had supported by the evidence the legislative finding regarding "average" children. (R. 84.) But the court thought the legislature made this finding as to only one half of the children to whom it applied the enactment. The court reached this result by isolating the word "average" from all the other words used in the findings (section 1 of the statute)[28] and from the statutory provisions concerning the children affected (section 3). The court then placed its own interpretation on the word "average", so as to read "children of average intelligence" as signifying "children of mean average intelligence". (R. 85.) By this means the court arrived at a finding that 10,000 out of 22,357 school children in the first four grades were so brilliant as to be able to undertake bilingual studies without injurious effect (R. 85, 112, Finding 13). The court then held that the statute unjustifiably applied to this upper half of the children. On the sole ground that the legislature intended to

[28]This was in violation of section 10 of the Revised Laws of Hawaii 1945, in effect when the statute was enacted as section 11 of the Revised Laws of Hawaii 1935, reading as follows:

> "Where the words of a law are dubious, their meaning may be sought by examining the context, with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning."

enforce the statute against more children than it had covered in its legislative findings, the court invalidated the whole statute. Whether or not the legislature had the power to apply the statute to *any* children (laying aside the question whether the statute was properly framed to apply only in the area of the evil to be met) the court did not decide. (R. 86.)

That the court's interpretation of the word "average" was erroneous as well as in violation of the deference rule is developed in Point VD of this brief.[29] The Court's Finding No. 13 as to the number of "bright" children rests on this matter of interpretation of the word "average". None of the witnesses supported the 10,000 figure, the witnesses on one side (that of appellees) testifying that generally bilingual studies at an early age produce no injurious results, while the witnesses on the other side (that of appellants) testified that generally bilingual studies at an early age have injurious potentialities. None of them drew the line at one half of all cases. This, also, is developed in Point VD.[30]

To illustrate the violation of the doctrine of abstention resultant from the lower court's approach: Defendant-appellants would construe together all parts of the statute, so as to enforce the statute with respect to the same children who are the subject of the legislative findings. Defendant-appellants thus take the position, and the lower court recognized this was their position (R. 86, last paragraph) that the statute contemplates enforcement, under 3, against the children of average intelligence mentioned in section 1, the

[29]Infra, pp. 81-84.
[30]Infra, pp. 84-89.

legislative findings. "Children of average intelligence" in the legislative findings means the general run of children, excluding the very small percentage of exceptionally brilliant children. These exceptional children are identified in the legislative findings as those who though perhaps only in the third grade, nevertheless are so clearly proficient in English as to attain a test score of 5.0 in standard tests. Children who attain such proficiency are mentioned in the findings as not subject to the injurious results perceived by the legislature with respect to the general run of children who have not passed the fourth grade, and defendant-appellants read this exception into section 3 of the statute where the "equivalent" of passing of the fourth grade is mentioned. (R. 43-44, Defendants' Exhibit 2, admitted R. 427; Assignment of Error 25, R. 125.)

If defendant-appellants are right, then upon the statute being so interpreted by the territorial courts, the entire basis for invalidation of the statute dissolves. The lower court, in deciding the constitutional issue upon its own interpretation of the statute as having no connection between section 1 (findings) and section 3 (children affected), violated the deference rule and the doctrine of abstention.

Out of respect to the lower court, counsel wish to point out that in placing its own interpretation on the statute it relied on a statement of this Court in *Pierce* v. *Society of Sisters*, 268 U.S. 510. (R. 83.) The leading case for the rule as to deference in matters of interpretation[1] having been decided sixteen years later, and having been consistently followed since that

[1] *Railroad Commission* v. *Pullman Co.*, *supra*.

date, this statement in the *Society of Sisters* case requires no further consideration.

Since the lower court did not follow the rule of deference in matters of interpretation it should at least have construed the statute so as to sustain its constitutionality.[32] To this rule the lower court did not advert. Territorial courts follow this rule of construction.[33]

We have submitted that disregard of the doctrine of abstention went so far in this case as to violate the case and controversy rule. The enforcement actually and imminently threatened by the defendants sued, being the officers charged with the admistration of the statute, set the limits of the controversy.[34] Defendants' pleadings (R. 75-76, par. XXVII of answer to amended complaint), Exhibit 2 (R. 43-44, admitted in evidence, R. 427, letter from Department of Attorney General to Department of Public Instruction,

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[32] *Jacobson* v. *Massachusetts*, 197 U.S. 11, 38-39; *Federation of Labor* v. *McAdory*, *supra*, 325 U.S. 450, 470; *Screws* v. *United States*, 325 U.S. 91; *St. Louis S. W. Ry.* v. *Arkansas*, 235 U.S. 350, 369; *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401; *Carey* v. *South Dakota*, 250 U.S. 118, 122; *United States* v. *Walter*, 263 U.S. 15; *Texas* v. *Eastern Texas R. R. Co.*, 258 U.S. 204, 217.

[33] *Territory* v. *Marshall*, 13 Haw. 76, 80; *Territory* v. *Miguel*, 18 Haw. 402, 409, error dism'd 214 U.S. 531; *Bannister* v. *Lucas*, 21 Haw. 222, 223; *Pan-American Airways* v. *Godbold*, 36 Haw. 170, 179, 182.

[34] *Watson* v. *Buck*, 313 U.S. 387, 400, followed in *United Public Workers* v. *Mitchell*, *supra*, 330 U.S. 75, 89, 91; *Ex parte La Prade*, 289 U.S. 444; *Southern Pacific Co.* v. *Conway*, 115 F.2d 746 (C. A. 9th 1940); *Pughe* v. *Patton*, 21 F.Supp. 182 (D.C.N.D.Tex. 1937).

construing law), and answers to questions of the court (R. 136-137, 138, 141-145, 152, 158, 173-178, 233, 242-243) fully disclosed the position of the defendants as to their interpretation and intended administration of the law.

In some respects a position was taken, in answer to questions of the court and out of courtesy to it, on matters not involved in the proceeding, such as what the position of the defendants would be as to employment of a French or Portuguese tutor for three children (R. 137). Such hypothetical questions, injected by the court, might or might not be answered by the territorial court as the defendants have answered them, when and if they actually arose, and in any event are immaterial to this controversy.[35]

Yet the court injected into the case still more of these hypothetical questions after the case was submitted, stating as its interpretation of the law (without knowing whether defendants would so enforce it, should

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[35]The constitutionality of the statute as applied to one not before the court or in a situation not yet arisen should not be considered. *Watson* v. *Buck*, *supra*; *Cronin* v. *Adams*, 192 U.S. 108, 114; *Heald* v. *District of Columbia*, 259 U.S. 114, 123; *Clark* v. *Kansas City*, 176 U.S. 114; *Hatch* v. *Reardon*, 204 U.S. 152; *Ashwander* v. *Valley Authority*, 297 U.S. 288, 324; *Coffman* v. *Breeze Corporations*, 323 U.S. 316, 324; *Territory* v. *Miguel*, *supra*, 18 Haw. 402, 404; *In re Craig*, 20 Haw. 483, 490. A statute may be upheld in its application to the case before the court even though it applies to other cases as to which it is or may be unconstitutional. *Berea College* v. *Commonwealth*, 211 U.S. 45; *Missouri Rate Cases*, 230 U.S. 474, 508.

the question arise, or whether a territorial court would uphold them in doing so) that the statute would apply to the teaching of the truths of Confucius by the cousin of a Chinese mother, the court assigning this as an objection to the law (R. 80).

We have set forth in Point VE our interpretation of the law, in so far as material, for the purpose of showing that in all reasonable probability the actual administration of the law will not prove unduly, if at all, burdensome. Whether the defendant-appellants' interpretation is correct, should that interpretation be disputed, is a matter that properly should be tried in an enforcement proceeding brought in due course in the territorial court in equity, under the terms of the statute.[36] (Point III, *supra.*) Or if the court is of the view that this is a proper case for declaratory relief (an issue argued under Point III) then declara-

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[36]Defendant-appellants had no opportunity to bring an enforcement suit in equity in the territorial court under the terms of the statute since the schools were not open. Likewise, the schools not being open, defendant-appellants could not submit, in the territorial court, to a stay of all proceedings under the statute, thereby holding the case in status quo in the federal court, as contemplated by section 266 of the Judicial Code (28 U.S.C.A. 380). For defendant-appellants to have submitted to such a stay in the territorial court would have been as erroneous as the issuance of a preliminary injunction in the federal court would have been, since any order of this kind would have effected a positive change in the status quo in violation of well-settled rules as to orders pendente lite (*Ball* v. *Paramount Pictures*, 57 F.Supp. 505, 507 (D.C.W.D.Pa. 1944); R. 47-49).

tory relief could be had in the territorial court." Thus we contend that, assuming without conceding that a cause of action has been stated here (as to which we submitted argument under Point III), nevertheless the proper limit of the present consideration of the case lies in the question put by plaintiff-appellees and which the lower court declined to answer (R. 112, Con. L. No. 1). This question, as we see it, is as follows: Was the territorial legislature acting within its constitutional powers when it sought to defer simultaneous instruction in English and Chinese to a point (fixed at the completion of the fourth grade) when English is sufficiently mastered to enable the child to undertake, without injurious results, intensive study of Chinese in a school devoted to that purpose? If this question is answered in the affirmative, then all questions as to the qualifications or exceptions to be made to the general requirements of the statute, and as to the conditions to govern such statutory regulation, should be laid aside to await interpretation of the statute via the territorial courts. This would mean dismissal of the case, not its retention to await the outcome of another suit in the territorial court, there being no need of equitable relief[38] against an enforcement proceeding in equity (Point III, *supra*).

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[37]Chapter 202, Revised Laws of Hawaii 1945, as amended by Act 74 (Ser. D-172) Session Laws of Hawaii 1945.

[38]When there is no need of equitable relief and interpretation questions arise, the case should be dismissed, not retained pending interpretation of the statute. (*Atlantic Fishermen's Union* v. *Barnes*, 71 F. Supp. 927, 928 (D.C.Mass. 1947).)

V. The Statute Represents An Exercise of the Police Power Within the Legislature's Prerogatives.

(This point covers Assignments of Error 14-29, 31, 34, 36-42; Specifications of Error as noted below.)

Defendants necessarily concede that if it is not possible to frame any state or territorial statute seeking to regulate the study of foreign languages by extremely young children, i.e., if such a statute is not a proper subject of legislation, then the territorial statute in question must fall. We propose to show that in view of the facts which the legislature did and properly could find, it was acting well within its prerogatives under the police power when it legislated on this subject.

The Territory of Hawaii has police power similar to that of any state of the United States.[9] When a statute lies within the field of the police power, when there is a particular problem or evil to be met, and when the statute in question is reasonably directed to meet it, the statute has met the requirements for valid legislation. Our argument will be directed toward establishing these points.

The scope of the police power of a state or territory is not static, but has extended its boundaries as the need for legislation in wider fields has been recognized. A constitutional statute may be based on a need not previously recognized, or upon further study of a problem, developing facts and arguments not pre-

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[9] *Farrington* v. *Tokushige*, 273 U.S. 284.

viously appreciated.[40] That the injurious effects of simultaneous study of two or more languages by children of tender age is now recognized by experts in the pedagogical field, that conditions in Hawaii aggravate the injury, and that legislative action requiring deferral of bilingual studies until passage of the fourth grade is warranted, will be developed in this point. We anticipate that appellees will rely on cases arising twenty-five years ago, involving statutes framed with far different objectives from that of the statute here involved. Hence as an introduction to our argument we remark that it is no objection to the present statute that the need met by it was not recognized, or at least not acted upon, sooner.

A. THE STATUTE REPRESENTS A PROPER EXERCISE OF THE TERRITORY'S POWER AS PARENS PATRIAE, IN THE SAME FIELD AS THE COMPULSORY EDUCATION LAWS.

(This part of the argument covers Specification of Error No. 5).

The individual states have always had power as *parens patriae* to make regulations regarding the welfare, education and health of the children residing therein,[41] and have supervised and controlled their contracts, occupations and conduct, even though in conflict with the liberty and property of others.[42] In *Warner*

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[40] *People* v. *Charles Schwinder Press*, 214 N.Y. 395, 108 N.E. 639, 644, writ of error dismissed 242 U.S. 618; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379; *Holden* v. *Hardy*, 169 U.S. 366.

[41] *Fontain* v. *Ravenel*, 17 How. (U.S.) 369.

[42] *Sturges & Burn Mfg. Co.* v. *Beauchamp*, 231 U.S. 320; *Interstate Consol. Street Ry.*, v. *Comm. of Massa-*

Bros. Pictures v. *Brodel*, 31 Cal. 2d. 766, 179 P. 2d 57 (reversed 192 P. 2d 949 without affecting quotation below), involving a California statute requiring court approval to validate certain movie contracts of minors, the court explained the relationship of the state towards children:

> "Minors as a whole have always been set apart and have been given privileges and immunities not possessed by the people as a whole. Because they are mentally undeveloped and are unable to exercise a mature judgment the state as parens patriae exercises control over their affairs through manifold statutes passed for their benefit. The doctrine of parens patriae is the inherent power and authority of the state to provide protection of the person and property of a person non sui juris."

The state may override the parent when necessary. Statutes requiring parents to furnish food, clothing and medical attendance to their children have been upheld as enforcement of a duty owed by the parent to the child in which the state as *parens patriae* has a valid interest.[1] The state may legislate regarding custody, adoption and guardianship of children, the parents' right of control and custody being treated not as an absolute right but rather as subject also to the legitimate interest of the state in the health and well-being of

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chusetts, 207 U.S. 79; *Muller* v. *Oregon*, 208 U.S. 412; *U.S. ex rel. Schornback* v. *Behrendsohn*, 197 Fed. 953 (D.C.E.D. La. 1912).

[1] *Heinemann's Appeal*, 96 Pa. 112, 42 Am. Rep. 532; *People* v. *Pierson*, 176 N.Y. 201, 68 N.E. 243; *Owens* v. *State*, 6 Okla. Cr. 110, 116 Pac. 345; *Stehr* v. *State*, 92 Neb. 755, 139 N.W. 676; *Comm.* v. *Hoffman*, 29 Pa. Co. Ct. 65; *State* v. *Chenoweth*, 163 Ind. 94, 71 N.E. 197.

the children." The state may limit the hours of labor of children,[45] prohibit labor under specified ages,[46] regulate the employment of minors in street trades and public performances,[47] prohibit employment of children in certain occupations,[48] and otherwise regulate child labor.[49] Of course, there would be no occasion for such laws if the state and the parent were in agreement as to the required protection of the child. So here, we are dealing with a difference of opinion between the state and the parent as to the welfare of the child. In such a conflict the state, if its policies have a reasonable basis and its measures seek to protect the well-being of the child (as distinguished from compelling his acceptance of certain dogma), always prevails.

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[45] *Lippincott* v. *Lippincott*, 97 N.J.Eq. 517, 128 Atl. 254; *Wisconsin Industrial School for Girls* v. *Clark County*, 103 Wis. 651, 79 N.W. 422, 427; *Comm.* v. *Fisher*, 213 Pa. 48, 62 Atl. 198; *Ex parte Januszewski*, 196 Fed. 123 (Cir.Ct.S.D.La. 1911); *Wadleigh* v. *Newhall*, 136 Fed. 941 (Cir.Ct.N.D.Calif. 1905); *McIntosh* v. *Dill*, 86 Okla. 1, 1922, 205 Pac. 917; *Geary* v. *Geary*, 102 Neb. 511, 167 N.W. 778, error dismissed 251 U.S. 535.

[46] 90 A.L.R. 814, 815; *Muller* v. *Oregon*, 208 U.S. 412; *Riley* v. *Comm.*, 232 U.S. 671; *Miller* v. *Wilson*, 236 U.S. 373.

[47] *Sturges & Burn Mfg. Co.* v. *Beauchamp*, 231 U.S. 320; *Terry Dairy Co.* v. *Nalley*, 146 *Ark.* 448 (1920), 225 S.W. 887.

[48] *Prince* v. *Massachusetts*, 321 U.S. 158; *People* v. *Ever*, 141 N.Y. 129, 36 N.E. 4; 152 A.L.R. 579.

[49] *In re Spencer*, 149 Cal. 396, 86 Pac. 896; *Inland Steel Co.* v. *Yedinak*, 172 Ind. 423, 87 N.E. 229; *Bryant* v. *Skillman*, 76 N.J.L. 45, 69 Atl. 23.

[50] 12 A.L.R 1216.

The interest of the state in the well-being of its children was the basis for upholding the statute involved in the case of *Prince* v. *Massachusetts*, 321 U.S. 158. A state statute prohibited children from selling newspapers and other periodicals in any street or public place. The state and the parents differed as to the harmful effects of children so vending magazines. The statute was held valid even as to children selling religious literature, even against an attack based on alleged infringement of the child's and parent's rights under the First Amendment. The court said,

> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. (Citations.) And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well-being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. (Citation.) The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction."

Pp. 166-167

In the field of education, the state's power to legislate is established.[50] The state as parens patriae is vitally interested in securing to each child the opportunity to acquire an education, and to this end statutes compelling school attendance are valid.[51] Such compulsory school attendance laws may require that private education offer the equivalent of public school attendance.[52] The state may require physical examinations for school admittance, in order to prevent disruption of the school program by the spread of diseases, and in order to minimize the handicaps to participation in the school program suffered by children having physical defects.[53] The laws requiring vaccination of children and prohibiting school attendance of non-vaccinated children[54] are not only a health measure but also remove a health hazard interfering with the education program. In the case of In re Marsh, 140 Pa. Sup. Ct. 472, 14 A.2d 368, a minor was made a ward of the state as a "neglected" child because the father refused to have him vaccinated and the child

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[50]*Prince* v. *Massachusetts*, *supra*, and see next footnote.

[51]*State* v. *Bailey*, 157 Ind. 324, 61 N.E. 730; *State* v. *Hoyt*, 84 N.H. 38, 146 Atl. 170; *State* v. *Williams*, 56 S. Dak. 370, 228 N.W. 470.

[52]*State* v. *Hoyt*, *supra*, citing and differentiating *Pierce* v. *Society of Sisters*, 268 U.S. 510.

[53]*Streich* v. *Aberdeen Board of Education*, 34 S. Dak. 169, 147 N.W. 779.

[54]*Jacobson* v. *Massachusetts*, 197 U.S. 11; *Viemeister* v. *White*, 179 N.Y. 235, 72 N.E. 97; *Bissell* v. *Davison*, 65 Conn. 183, 32 Atl. 348; *Abeel* v. *Clark*, 84 Cal. 225, 24 Pac. 383; *Duffield* v. *School District*, 162 Pa.St. 476, 29 Atl. 742; *Cram* v. *School Board*, 82 N.H. 495, 136 Atl. 263; *State* v. *Drew*, 89 N.H. 54, 192 Atl. 629.

therefore could not attend school under the state's compulsory education law.

The premise of our argument is that as part of the compulsory school attendance program the state may make reasonable regulations to prevent or minimize handicaps put upon the child by his parent in his attainment of a basic education. Such handicaps when of a physical nature, such as child labor or non-immunity to smallpox, are readily recognized. That other handicaps are not as susceptible of detection does not deprive the state of its power to curb them by reasonable regulations, when they have been recognized and established by competent proof.

Plaintiff-appellee school corporations do not purport to offer a complete school program. There is not involved in this case any question of the right to impart a basic education using Chinese or another foreign language as the medium of instruction. This case starts out with the premise that "the pupils who attend said schools conducted by said plaintiffs are urged and required to attend the said public schools in their respective communities." (R. 59.) Plaintiff-appellee school corporations seem to think that in avoiding a conflict in hours of attendance they have avoided all conflict with the attainment by their pupils of a basic grade school education in the public schools. Such is not the case.

Hawaii provides good physical facilities for its schools, highly qualified teachers, a well rounded program of subjects, and in every other respect a school system of the highest calibre. (H. Rept. No. 1620, 79th Cong. 2d Sess., report of subcommittee of the Committee on the Territories, Findings No. 39 and 40, be-

ing Appendix 4 of H. R. Rep. No. 194, 80th Cong. 1st Sess., referring to the subcommittee report at p. 11. See also R. 529). Yet there is a retardation in the accomplishment of the school curriculum as compared with similar schools on the mainland. The cause of this retardation is the language problem. The basic grade school education is conducted through the medium of the English language. Lack of facility in the medium of learning is bound to retard the pupil. That this retardation exists and the over-all cause of it were recognized by the trial court and admitted by plaintiff-appellees.

Said the court below in its opinion:

> "* * * in many instances Hawaiian children are required to frame their thoughts and to express them in three distinct languages. One is the language of the home, where a child, say of Portuguese parents, has all his intimate home activities in Portuguese. Another is what is called 'pidgin,' an extension of that lingua franca of the China, South Asiatic and Malayan coast cities in which the foreign residents conduct their personal and commercial relations with the lesser educated resident nationals. To this the Hawaiian people have added words and phrases assimilated from the Portuguese, Hawaiian, Koreans and others. The testimony is that much of the inter-communication of children from homes where a foreign language is spoken is in this pidgin and that even some teachers use it in clarifying English words to their pupils. The third language is English.
>
> With many of the children so using the three languages, the testimony of the defendants is that there is in the sixth grade a retardation in accomplishment of the school's curriculum of over six months behind that of similar schools on the mainland. The parties dispute as to the major

> causa causans. Plaintiffs, while not contesting the retardation, contend that pidgin and not the language schools is the principal cause. Defendants claim it is because of the language schools." (R. 84)

The foregoing shows that the lower court found retardation in the school curriculum due to lack of facility in English. As to the lower court's further statement as to the nature of the dispute between the parties, this will be analyzed below.[55]

Mr. Wirin, attorney who appeared on behalf of the plaintiffs, admitted the retardation to be true. (R. 322.) Mr. John E. Reinecke, a witness for the plaintiffs, although he disagreed with the Territory as to the weight to be given the various factors affecting the situation, admitted that there is a language handicap among children entering the grade schools in Hawaii and that in their progress in their school studies the children are behind the mainland norms. (R. 227).

As the foregoing shows, lack of facility in English, the medium of learning, exists when the child comes to school and continues throughout his school life. This is explained in the Community Survey of Education in Hawaii, 1941, Defendant-Appellants' Ex. 1:

> "The total score of non-English Standard 6th grades in all subjects tested was 5.4. The mainland score is 6.2. This means that the non-English Standard 6th grade average is four-fifths of a year lower than the mainland score. The English Standard Schools average 6.2, exactly the same as the mainland. The largest differences in the scores are in reading comprehension and reading vocabulary and in language. The reading voca-

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[55] *Infra*, p. 69.

bulary score in the non-English Standard schools is more than two years below the English Standard score."

(R. 561)

"The non-English Standard 9th grade score is 7.7. The mainland score is 9.2. This means that the non-English 9th grade score is one and one-half years below that of the mainland. The English Standard score is 9.1, slightly below the mainland score. The largest differences, as in the 6th grade, are in reading vocabulary and reading comprehension."

(R. 561)

"* * * Many of our children are two years or more behind mainland children in English when they enter the first grade at six years of age."

(R. 563)

"The conclusion to be drawn from this study is that Hawaii's pre-school children of foreign ancestry who do not attend kindergarten are very seriously handicapped in oral English. They enter school with a two to three year retardation in speech."

(R. 571)

"* * * In the non-English Standard schools more errors are still found in the twelfth grade than are made by the first-grade children in English Standard schools.[56]

"In written English twelfth grade pupils in non-English Standard schools make about as many

[56]The Survey shows that English Standard school pupils have attainments comparable to mainland school pupils (R. 563, 575). These English Standard school pupils are less than twenty per cent of all public school pupils. (R. 245)

errors as do sixth grade children in English Standard schools. * * *"

(R. 573)

"In the qualities of interesting thought and clear way of saying things (correctness of grammar not being considered), pupils' informal written composition seems to be 2 to 6 years, on the average, behind that of mainland children of the same grade.* * * *"

(R. 585)

"In ability to understand what they read, pupils in local schools are, in general, fully a year behind mainland children of like grade (the retardation varing from ¾ to 1½ years in different grades)." * * *"

(R. 585)

Note also the following:

"But recently in the Manual of Child Psychology, edited by Carmichael in a chapter on child development, they brought data on a whole lot of areas in the United States, *and Honolulu bilinguals were at the bottom of any group of children.*" (Emphasis added) Testimony of Dr. Madorah Smith, R. 415).

The Community Survey found that the retardation was not confined to English. As a result of the retardation in the medium of learning, there is a general retardation.

"The pupils in general made higher scores in intelligence than in achievement. In grade VI the achievement was 10 points lower than the intelligence score; in grade IX, 7.8 points lower; and in grade XII, 10.5 points lower. *These figures indicate that the children on the average are achieving below their ability in both English Standard and non-English Standard schools.*"

(R. 562)

> "The tests bring out very strongly the effect of the language handicap on general academic achievement. *To get maximum improvement in school achievement the schools must aim first at improvement in English.*"
>
> (R. 563)

This improvement in the medium of learning must be accomplished while the children are in their early and formative years, the Survey shows.

> "The handicap must be attacked at or near the point of origin, while language habits are in the process of being formed. Only after this step is taken can more normal results be expected from school effort during later years."
>
> (R. 588)

Thus, as summarized by Dr. Loper, Superintendent of Public Instruction, one of the serious problems confronting the first grade teacher is to prepare the children to carry on the work of the schools. (R. 244, 246) They enter school with a handicap. The validity of the law must be considered in the light of this existing condition.

The law is based on the premise that bilingual studies by children of tender age are injurious. The result is retardation in acquisition of both the English and the foreign language. As above shown, retardation in English necessarily interferes with the child's progress in all subjects of the school curriculum. Bilingual studies at too early an age result in confusion and emotional disturbances. Where the foreign language is an oriental language the confusion is increased by the great differences in the two languages and in the teaching methods.

Committees of the legislature made reports (R. 33-39, received in evidence R. 452), which the legislature considered before passing the law now in question. These reports show that the legislature had before it and proceeded upon the basis of proof of the facts above outlined. Further such proof was adduced in court. The experts who testified are listed in the footnote.[7] The substance of their testimony was as follows:

As to the retardation in English (as well as the foreign language) and the general retardation in school work, resulting from too early bilingual studies:

[7] Dr. W. Harold Loper, Ph.D., Superintendent of the Department of Public Instruction of the Territory.

Dr. F. Deal Crooker, Ph.D., teacher in Hawaii.

Dr. Bruce White, Ph.D., associate professor of education at the University and acting dean of Teachers' College, University of Hawaii.

Mr. Richard Meyer, Assistant Superintendent of the Department of Public Instruction of the Territory.

Mr. Oren E. Long, former teacher, and at time of the trial Acting Governor of the Territory.

Dr. J. Robert Jacobson, M.D., clinical director at the Territorial Hospital at Kaneohe.

Mrs. Sarah Lee Yang, supervisor of fourth, fifth and sixth grades at Teachers' College Elementary School, University of Hawaii.

Miss Helen Gay Pratt, Director of Child Study and Remedial Work with Department of Public Instruction.

Mr. Orin W. Robinson, Deputy Superintendent and Director of Curriculum, Department of Public Instruction.

Mr. William Wong, Territorial School Principal (by stipulation).

Dr. Madorah E. Smith, Ph.D., retired psychologist and university teacher.

The large portion of first grade pupils with an existing language deficiency would be hindered or handicapped in the accomplishment of their regular school work, and have been so for many years, by commencing at the same time their studies of a foreign language.

(R. 245)

It has been found necessary that great stress be placed upon the English language in the first grade or just prior to the first grade.

(R. 246)

"* * * the introduction of a foreign language at such an early age is going to tend to confuse the child in the proper acquisition of skills in the English language, reading, that has to do with reading, it has to do with written work, it has to do with the spelling;"

(R. 298)

"* * * that would be the kind of a situation where neither thing was mastered."

(R. 310)

The study of foreign languages by children in the first four grades interferes with their regular public school work.

(R. 320)

Language school attendance and study on the part of children interferes with the work of the teachers in the public schools.

(R. 320-21)

The generalized English language deficiency has been adversely affected by the study of a foreign language by a large number of the children at the same time they are pursuing their regular school work.

(R. 323)

"I have noticed that most of the boys and girls that went to language schools spoke a brand of

English which was very much inferior to the other boys and girls."

(R. 365)

The study of a foreign language by children in the first four grades does interfere with their regular school progress.

(R. 387)

The retardation in the acquisition of English definitely interferes with the general progress of the children in the schools, and the child who is retarded or incapable in English is unable to carry on the work of the school, which is in English.

(R. 392)

The teaching of the Chinese language in the first few grades interferes with the progress of the children in the regular public school work, and their learning of the Chinese language can be better accomplished if it is taken up after completion of approximately the fourth grade of public school.

(R. 397)

The children who had not been to foreign language school made over twenty per cent higher score on reading tests, showed less confusion, and less than half as many errors of reversal as those who had gone to foreign language school.

(R. 405)

Intelligence tests, in both English and Japanese, given to bilingual children showed a retardation in both cases. The children were nine to fifteen years old and the younger children were much more retarded than the older children. It was concluded that the retardation was due to the fact that the children had not reached a mental stage which was required by bilingualism.

(R. 407)

It is the starting of two languages at the same time "that is particularly disastrous."

(R. 409)

"The trouble is that if these children are so badly retarded when they come to school, they certainly must have a chance to learn English before they are handicapped with trying to do another language at the same time."

(R. 415)

"A child must be of exceptional ability if he is to learn two languages at the same time."

(R. 413)

(Further such testimony is sumarized in Part D, pages 86-88, *infra.*)

As to the confusion and emotional disturbances resultant from too early bilingual studies, particularly where the foreign language is an oriental language:

In the teaching of English emphasis is placed on increasing the eye span of the child in reading from left to right, and the study of reading and writing of the oriental language which reads from top down and from right to left across the page interferes with such learning.

(R. 247 and 406).

English teaching stresses silent reading or orally in small groups; oriental language teaching stresses recitation in unison.

(R. 249)

The mouth expressions in forming sounds are different.

(R. 320)

There are differences in methods of teaching and arrangement of words and sentences.

(R. 345)

"* * * imagine the bewilderment of the six-year old child in Honolulu who starts to school and immediately is faced with the problem of trying to learn two languages, one beginning at the left on the top of the page and going east, and the other starting at the top right and going south."

(R. 406)

Where we are trying to teach a child that in one respect a response is correct, and in a very similar situation another response is correct, so the child doesn't know which he should do—"there will be difficulty, emotional disturbance of some sort, interference with learning."

(R. 310)

Where the child has been in a [language] school under one condition, then he comes to the public school and is asked to work under a different condition, he is bound to be disturbed.

(R. 322)

The difficulty in reading sets up a conflict in the child—it is harmful to a child to have these conflicts set up in himself.

(R. 338)

It seems inevitable that after a part of the day in a school with a certain atmosphere, certain methods, using the English language, having the beginning books, the primer, introduced with the established or traditional arrangement of the words, the sentences, for small children, then to go for a period of time the same day to a school where the atmosphere is different, that is, the whole setup, where the differences are so great in the materials used, there would be a considerable degree of confusion.

(R. 345-6)

Language disturbance was the outstanding evidence of general emotional disturbance of many

children in Hawaii who were given psychiatric attention and treatment.

(R. 373)

"I have been working with all the children enrolled in the first grade in specific schools, and I work with them myself in the classroom every day. I have yet to find a child that I think could take the burden of an additional language at that age."

(R. 390)

Educators in many countries have concluded that bilingual studies should be deferred at least until passage of the fourth grade. Dr. Madorah Smith referred to studies of educators as follows:[*]

1. Verheyens, in Belgium, comparing children who started a second language after ten or eleven, found they were much less handicapped by their bilingualism than those who had begun earlier.

(R. 408)

2. In Gaelic speaking communities in Scotland, children are not permitted to start learning to read and write Gaelic until they are ten years old "at which time they are reported to make very rapid progress because of the delay".

(R. 409)

3. In Sweden, where knowledge of the German language is regarded as essential for every Swedish child, the teaching of the German language commences in the fifth grade, and the teaching of English is commenced in the eighth school year, care being taken that the study of two languages is not started at the same time.

(R. 409)

[*]See also page 91, *infra*, showing that more rapid progress is made in the foreign language when the study of it is delayed until the first language has been sufficiently mastered.

4. In Switzerland, the second language is not commenced until the upper primary, or approximately ten years of age. While this country has three official languages, French, German and Italian, in the lower grades children may undertake studies only in one language. For example, in a given area a family might sent a child to a French speaking school or to a German speaking school, but the family cannot send the child to both. Irrespective of which is the first language studied, the second language is not started until the child is approximately ten years of age, which is the beginning of the upper primary. If there is a third language, that is to wait until still later.

(R. 409-410, 410-411)

5. Saer, an authority in Wales, based on researches showing that growth of vocabulary is relatively slow between five and nine years of age, then increases rapidly, concluded that the acquisition of a second language should be delayed in the schools until about nine years of age.

(R. 410)

6. The conclusion from a study made by a French university professor of the bilingual difficulty in Alsace-Lorraine was that children should delay even beyond the age of eleven or twelve years before undertaking the study of a second language.

(R. 411)

It is important to note that in bilingual countries the practice is to defer the commencement of a course of study in the second language at least until passage of the fourth grade.[59] Such prevailing practices support the legislative determination.[60]

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[59] Items 2, 3 and 4, of the studies above cited

[60] *Jacobson* v. *Massachusetts*, *supra*, 197 U.S. 11, 35; *Viemeister* v. *White*, *supra*, 179 N.Y. 235, 72 N.E. 97.

To summarize the dispute between the parties: It has been shown and is admitted by plaintiff-appellees that children in Hawaii come to school with a handicap of deficiency in the English language, the medium of instruction, and this handicap continues throughout their school life. Whether this handicap at the inception of the school curriculum is due to the fact that the pupils speak more than one language or is due to the prevalence of pidgin English is not the issue. It is not claimed that this initial handicap is due to foreign language studies, as distinguished from mere conversational usage, for foreign language instruction in reading and writing in the schools conducted by plaintiff-appellees before the war, commenced in the first grade. Hence, the dispute between the parties is not as to the cause of the English handicap at the inception of the child's schooling but as to the treatment of the situation thereafter. The dispute concerns the power of the legislature to regulate what is in itself an added handicap to the child during his early and formative school years, that is, the handicap incident to intensive study of a foreign language at a time when he is not mature enough to undertake it.

Of the three handicaps to facility in English, the medium of instruction, the two which plaintiff-appellees conceded to exist could not practicably be controlled. That is, informal use by children of a foreign language in their home or at play, as a natural part of their environment, could not be legislated out of existence. Nobody would wish to so legislate. As to pidgin English, improvement gradually is being made, but it cannot be legislated out of existence. The legislature could and did act as to the third matter, that is, the handicap to the child who has commenced

school, and if not protected, may be put to intensive study of a foreign language at the very time when he is least able to cope with it and most needs to acquire facility in English in order to carry on his basic school studies.

Under well-settled rules,[61] proof of other handicaps, such as the prevalence of pidgin English, not controlled by the legislature because it is not practicable to do so, does not mitigate against its authority to cope with this particular handicap. Even conflicting opinion as to whether too early bilingual studies are a handicap to the child does not mitigate against the authority of the legislature, for it has the power to decide which body of opinion it will follow.[62]

The object of the Territory's legislation being to prevent or minimize a handicap to the child, the statute is clearly distinguishable from those held invalid in the *Society of Sisters*, *Meyer* and *Tokushige* cases. In *Meyer* v. *Nebraska*, 262 U.S. 390, the court found that the object of the law was "to foster a homogeneous people with American ideals * * *". (P. 402.) The law sought to combat foreign influences, which were said to imperil the public safety. (P. 401.) The law did not forbid bilingual studies as such, for Latin and Greek might be taught at any time. On this account and from lack of proof to the contrary, the opinion of Mr. Justice McReynolds assumed that instruction in a foreign language at an early age was not injurious to the child. He further assumed that foreign language instruction must begin at an early age for proficiency in the language to be acquired. (P. 403.)

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[61] *Keokee Coke Co.* v. *Taylor*, 234 U.S. 224; *Standard Oil Co.* v. *Marysville*, 279 U.S. 582, 586.

[62] *Infra*, part C of this point.

Both of these assumptions have been disproved here. Hence it cannot be supposed here, as it was in *Meyer* v. *Nebraska*, that children of tender years are able to absorb their common school studies in the English language and instruction in a foreign language, side by side, without impingement of the one upon the other. That supposition, made in *Meyer* v. *Nebraska*, reduced the statute there involved to the proposition that it was unpatriotic for one not thoroughly steeped in American ideals to pursue the study of a foreign language; in fact this was the argument made in support of the statute (pp. 393-4) and adopted by the lower court (pp. 397-8). Thus the statute in the *Meyer* case was one of those seeking to promote the acceptance of American ideals.

Likewise in the other cases the object of the statute was the promotion of the state's Americanization program, not the protection of the child. In *Farrington* v. *Tokushige*, *supra*, 273 U.S. 284, the declared purpose of the statute was "to fully and effectively regulate the conducting of foreign language schools and the teaching of foreign languages, in order that the Americanism of the pupils may be promoted." And in *Pierce* v. *Society of Sisters*, 268 U.S. 510, the object of the statute was the promotion of the "safety and power of the State itself." A statute having a similar object was the one involved in *West Virginia State Board of Education* v. *Barnette*, *supra*, 319 U.S. 624, 639. There the regulation was intended to promote loyalty to the state, and was not concerned with the welfare of the child; the regulation actually led to the exclusion of the child from school. The regulation sought to compel the acceptance of certain

beliefs, not to relieve the child of a handicap to his acquisition of learning.

Thus the foregoing cases involved statutes of a type and having a purpose plainly distinguishable from that now under consideration. In said cases the conflict lay directly between the rights of the parent on the one hand and the state, for its own protection, on the other. As previously pointed out, the conflict involved here lies between the state and parents as to what is in the best interests of the child.

The state's own power, protection, and security, or the state's aggrandizement, although the same may be a legitimate object of legislation, is not the same type of purpose as the welfare of children, and the cases dealing with the former cannot be regarded as determinative of the present case dealing with the latter. In the *Meyer* v. *Nebraska* line of cases, the only showing was that the statute was desirable to eliminate adherence to foreign customs, which in themselves constituted no danger to the state; the desirability or non-desirability of adherence to foreign customs is a matter wholly outside of the scope of the Hawaiian statute and the present case.

B. The Clear and Present Danger Rule Does Not Apply.

(This part of the argument, with Part C, infra, supports Specification of Error No. 6.)

The general rule, which defendant-appellants submit governs the present controversy, is that a statute enacted under the police power is valid unless

shown to be arbitrary and without reasonable basis.[63] Defendant-appellants contend there is no merit to the claim, advanced by plaintiff-appellees in the trial in the lower court, that the clear and present danger rule is applicable, under which rule a statute may be invalidated unless the act or acts prohibited involve a clear and present danger of substantive evils which the legislature has a right to prevent.[64]

The clear and present danger rule does not apply in the present case for two reasons: (1) The rule does not apply to a conflict between the state as parens patriae and the parent as to the welfare of the child; and (2) the rule applies only in First Amendment cases and this is not such a case.

(1) THE CLEAR AND PRESENT DANGER RULE DOES NOT APPLY TO A CONFLICT BETWEEN THE STATE AS PARENS PATRIAE AND PARENTS AS TO THE WELFARE OF THE CHILD.

In the case of *Prince* v. *Massachusetts*, *supra*, 321 U.S. 158, it was held that a state statute imposing penalties on a parent or guardian who permitted a minor to sell papers or merchandise in public places was valid even as to the sale of religious literature. Religious liberty under the First Amendment was clearly involved and the clear and present danger rule was invoked. It was recognized that this rule would have invalidated a similar law applied to adults, but the court rejected the clear and present danger

[63] *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 191; *Standard Oil Co.* v. *Marysville*, 279 U.S. 582; *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342; *Townsend* v. *Yeomans*, 301 U.S. 441.

[64] *Abrams* v. *United States*, 250 U.S. 616, 630.

rule in that case because the statute was enacted for the welfare of the child. It was a case of conflict of opinion between the family and the state, as parens patriae, as to the welfare of the child, governed by the usual rule "that the state has a wide range of powers for limiting parental freedom and authority in things affecting the child's welfare" (id. p. 167), and "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults" (id. p. 170).

Similarly, other cases involving a conflict between the religious freedom of the parent and the welfare of the child have been decided on the usual presumptions and tests of reasonableness rather than from the standpoint of clear and present danger.[65] In *Commonwealth* v. *Herr*, 229 Pa. 132, 78 Atl. 68, a law prohibiting teachers on duty from wearing religious garb was held valid in spite of the claimed conflict with the teacher's right to religious freedom, and without application of the clear and present danger rule. Cases involving a conflict between the liberty of the parent under the Fourteenth Amendment and the welfare of the child are the same. The statute in *People* v. *Ewer*, 141 N.Y. 129, 36 N.E. 4, which prohibited exhibitions by children was upheld against attack under the due process clause of the Fourteenth Amendment, the court stating that it would only interfere with arbitrary exercise of legislative power and not with the judgment of the legislature.

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[65] *People* v. *Pierson*, 176 N.Y. 201, 68 N.E. 243; *Owens* v. *State*, 6 Okla.Cr. 110, 116 Pac. 345; *Comm.* v. *Hoffman*, 29 Pa.Co.Ct. 65; *State* v. *Chenoweth*, 163 Ind. 94, 71 N.E. 197.

Thus the court did not apply the clear and present danger rule.

We have shown that the cases involve two types of legislation: (a) legislation promoting the education, health and well-being of the child and removing obstructions thereto; and (b) legislation designed to control or censor the content of the child's thought, so as to shape him in the direction the state elects he should go.

In the first type of situation the clear and present danger rule does not apply. The parent's right of custody or control does not extend to the point of overruling a legislative finding of injury to the child or interference with the child's rights, such rights of the child including the right to secure an education, as well as to be protected from ill health, disease, injurious labor, or neglect. Legislation requiring vaccination of the child, restricting or prohibiting child labor, compelling attendance at public or private schools, and the like, comes under this category. The common element in these cases is that the state's regulation seeks to protect the opportunities of the child. So here, the state seeks to open the child's mind, not to close it. There is no denial of the right to study Chinese customs and history at any time, nor is there any denial of the right to study Chinese, merely deferral of such study for a reasonable period because bilingual studies at too early an age will handicap the child in his acquisition of a general education.

The clear and present danger rule would properly be applied to legislation which sought to control the

child's thinking, to close his mind to certain concepts and ideas, or compel the acceptance of those ideals deemed beneficial by the state. Such was the nature of the *Meyer* v. *Nebraska* line of cases and *West Virginia* v. *Barnette*. The difference between securing a basic education to a child on the one hand, and affirmatively directing his every thought on the other, is brought out in *State* v. *Hoyt*, *supra*, 84 N.H. 38, 146 Atl. 170.

(2) THE CLEAR AND PRESENT DANGER RULE APPLIES ONLY TO FIRST AMENDMENT CASES, AND THE TERRITORIAL STATUTE IS NOT SUCH A CASE.

In the present case the plaintiffs are not claiming infringement of any rights under the First Amendment. The complaint specifies the Fifth Amendment as the basis for suit (Amended Complaint, Par. III, R. 57) and the only plaintiffs remaining in the case are the corporation schools and a teacher of Chinese, each claiming their property has been taken without due process of law.

By the nature of plaintiffs' case, no rights under the First Amendment could be involved, but only property or liberty under the due process clause of the Fifth Amendment. Hence it is readily understood why only the Fifth Amendment was specified in the complaint.

In *West Virginia State Board of Education* v. *Barnett*, *supra*, 319 U.S. 624, 639, the court pointed out that the clear and present danger rule does not apply to liberty asserted generally under the due pro-

cess clause apart from the First Amendment guarantees. In that case, requiring a child to salute the American flag was held unconstitutional and the clear and present danger rule was applied, because there was a violation of a First Amendment principle, asserted under the Fourteenth Amendment. The flag salute was contrary to the religion of the child. The regulation sought to compel, not to protect the child, for "the State * * * employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks." (319 U.S. at p. 633.)

The clear and present danger rule was a gradual evolution from early dissents in First Amendment cases[66] which were later accepted as the majority opinion of the Court. In every case where it has been applied liberties guaranteed under the First Amendment have been involved.[67]

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[66] *Abrams* v. *United States*, 250 U.S. 616, 630; *Schaefer* v. *United States*, 251 U.S. 466, 486; *Gitlow* v. *New York*, 268 U.S. 652, 672.

[67] *Whitney* v. *California*, 274 U.S. 357, 374 (Criminal Syndicalism Act); *Bridges* v. *California*, 314 U.S. 252, 261 (newspaper comment); *Schenck* v. *United States*, 249 U.S. 47, 52 (espionage act); *Herndon* v. *Lowry*, 301 U.S. 242 (anti-insurrection act); *Thornhill* v. *Alabama*, 310 U.S. 88 (picketing); *Thomas* v. *Collins*, 323 U.S. 516 (registration of labor union speakers); *Schneider* v. *State*, 308 U.S. 147, 163 (distribution of printed matter and holding public meetings); *Lovell* v. *Griffin*, 303 U.S. 444, 451 (distribution of literature); *Stromberg* v. *California*, 283 U.S. 359, 369 (displaying red flag at meeting).

C. The Conflict in Expert Opinion as to the Harmfulness of Simultaneous Study of English and Oriental Languages by Extremely Young Children is for the Legislature, Not the Courts, to Resolve.

(This part of the argument, with Part B, supra, supports Specification of Error No. 6.)

Since the clear and present danger rule does not apply, the usual presumptions as to constitutionality prevail in the instant case. As part and parcel of the presumption of constitutionality, where there is a conflict of opinion as to the facts upon which the statute is based the legislature alone has the prerogative of deciding which body of expert opinion it will follow.[a] In the present case the legislature adopted that body of expert opinion which holds that bilingual instruction is harmful to a young child. Such opinion accordingly cannot be rejected by the court even though the members of the court, were they sitting in the legislature, might be disposed to reject it. There was a difference of expert medical opinion in the early vaccination cases cited in note 54 *supra*, but the law was upheld even though its efficacy as a preventative was considered debatable and it was even thought that there might be harmful results in some cases.

When the legislature incorporates findings of fact in a statute, its prerogative of resolving conflicts of

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[a] *Erie R. Co.* v. *Williams*, 233 U.S. 685, 699; *Nashville etc. R. Co.* v. *Walter*, 294 U.S. 405; *Jacobson* v. *Massashusetts*, 197 U.S. 11, 30; *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 191; *Standard Oil Co.* v. *Marysville*, 279 U.S. 582; *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342; *Townsend* v. *Yeomans*, 301 U.S. 441.

opinion is especially clear. Such findings spell out the bases for the legislation, instead of leaving it for the court to speculate as it otherwise would have to, whether the legislature in fact did proceed on the basis urged before it. When, as here, such findings are supported by competent opinion, even if not universal opinion, such findings are not reversible by the courts." In *San Francisco* v. *Market Street Ry. Co.*, 98 F.2d 628, cert. denied 305 U.S. 657, rehearing denied 306 U.S. 667, a city ordinance prohibited one-man street cars in the city of San Francisco. Legislative findings set forth that one-man street cars increased traffic hazards and were dangerous to the public. The lower federal court had made its own study of the facts, hearing expert testimony on the same, had overruled the findings of the legislature and had granted a permanent injunction against enforcement of the act; but on appeal to the circuit court, its decision was reversed. The Circuit Court refused to disturb the legislative findings when there was conflicting evidence, and compared the legislative prerogative to that of a jury:

> " 'Within the field where men of reason may reasonably differ, the legislature must have its way.' *Williams* v. *Mayor*, 289 U.S. 36, 42, 53 S.Ct. 431, 433, 77 L.Ed. 1015; *Missouri Pacific R. Co.* v. *Norwood*, 283 U.S. 249, 255, 51 S.Ct. 458, 461, 75 L.Ed. 1010. If there is substantial evidence to sustain constitutionality, although there may be strong contrary evidence, the question is fairly debatable. It is somewhat similar

"*United States* v. *Carolene Products Co.*, 304 U.S. 144.

Same rule applies as to state statute, *Sullivan* v. *Shreveport*, 251 U.S. 169, 172.

to a jury case. A question is to be decided by a jury when there is substantial evidence on one side, despite strong evidence on the other side." (Pp. 633-634)

In the present case the legislative findings are supported not only by the opinion of expert witnesses but also by the evidence of educational practices prevailing in bilingual countries.[11] That such prevailing practice is to defer the formal study (as distinguished from conversational knowledge) of a second language until at least passage of the fourth grade, clearly supports the legislature in accepting that body of opinion which holds that earlier bilingual studies are both harmful and unnecessary to the learning of a foreign language, and in rejecting that body of opinion which holds that the best way to learn a foreign language is to make it one of the first studies undertaken by the child.

D. "CHILDREN OF AVERAGE INTELLIGENCE" MEANS AND REFERS TO THE GENERAL RUN OF CHILDREN BOTH THE LEGISLATIVE FINDINGS AND THE TESTIMONY OF THE WITNESSES RELATE TO ALL BUT EXCEPTIONALLY BRILLIANT CHILDREN.

(This part of the argument further supports Specification of Error No. 3, and covers Specifications of Error Nos. 7 and 8.)

"Children of average intelligence" as used in the legislative findings clearly means the general run of children, excluding only the very small percentage of exceptionally brilliant children.

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[11] *Supra*, part A, pages 67-68.

It would not be necessary to elaborate this point were it not for the opinion of the lower court which, through a strained construction put on the words "children of average intelligence", created a constitutional difficulty in the statute by causing the legislative findings to relate to only half of the children while applying the rest of the statute to all of the children.

We submitted in Point IV *supra* that under the doctrine of deference the trial court should not have rested the case on the interpretation of the statute, in the absence of its interpretation by the territorial courts. That in any event the trial court's construction was erroneous, will now be shown.

According to the standard unabridged dictionaries, the word "average", used as an adjective as it is here, has two possible definitions.

> (a) *The mathematical meaning of average*: Equaling an arithmetical mean (Webster's New International Dictionary, 2d edition, unabridged, 1948).
>
> (b) *The non-technical, common meaning of average*: Ordinary, usual; common, typical (Webster's, supra). Of medium character, quality, etc.; midway between extremes; ordinary. (Century Dictionary & Cyclopedia, 1911).

The word "average" has been applied by the courts in either its techinal or non-technical meaning according to the context and use of the word. Courts frequently use the word "average" as interchangeable with "normal", i.e., the second of the meanings above quoted from the dictionary.[2] Upon consideration of

[2] *Woodruff* v. *State*, 164 Tenn. 530, 51 S.W. 2d 843, 848, *State* v. *Haner*, 186 Iowa 1259, 173 N.W. 225, 226.

the context of the statute it could have no other meaning in this case.

As above noted[7] all territorial statutes are enacted in the light of the rules of construction laid down in the Revised Laws of Hawaii, and section 10 thereof requires examination of the context to determine the meaning of dubious words. Since the word "average" has a dual meaning, its meaning is necessarily dubious if considered alone, although if taken with the context its meaning is clear.

The legislative findings, even without consideration of the rest of the statute, clearly show that the legislature was concerned with children as a whole. The findings state that bilingual study "by children of average intelligence in their early and formative years" retards progress in their normal studies; that bilingual study "in such early and formative years" causes emotional disturbances; that bilingual teaching acts "to the detriment, as foresaid, of children in their early and formative years;" that foreign language study should be deferred for the welfare of "children of tender age" "until each child" shall have passed the fourth grade "unless such child is earlier able to speak, write and read the English language and has attained a test score of at least 5.0 on standard tests in composition and in reading."

Thus, from a reading of the entire findings contained in section 1 of the statute, it appears that the legislature was concerned with "children of tender age" as a class. "Each such child" was included in the findings, which are in harmony with section 3 of

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[7]Note 28, supra.

the statute, not at cross purposes as held by the trial court. Section 3 provides that "no child" shall be taught a foreign language until and unless he meets certain requirements.[74] There is no difficulty in following the usual rule of construing the statute as a whole.

The phrase, "children of average intelligence" was used once at the outset of the findings to indicate that there were some exceptional children to whom the findings did not apply. These exceptional children were defined in the findings as those who though in the general class of "children of tender age" nevertheless were able to test 5.0 on standard tests in English composition and reading. Defendant-appellants read the same exception into section 3, where there is room for it because of reference to the equivalent of passage of the fourth grade. As the findings in section 1 show, the legislature decided that the attainment of a test score of 5.0 gave assurance of English proficiency sufficient for the child to progress in his basic school studies; thus the legislature considered such English proficiency the equivalent of actual demonstration of progress in the basic school studies through actual passing of the fourth grade.

Under the usual rules of construction, the court will not presume that the legislature intended to pass an unconstitutional law.[75] As a necessary corollary, the court should have presumed that the legislature did not intend in section 3 to enact the law for a different group of children from those covered in the findings in section 1 of the statute. This is an addi-

[74]These requirements are outlined in Part E of this point.

[75]Note 32, supra, Point IV.

tional reason why the statute should have been interpreted as a whole, in accordance with well settled principles.

The following quotations from the legislative committee reports, made to the legislature before it adopted the statute in question, show that the legislature was considering the effects of bilingual study on children of school age generally, and not just those of mean average intelligence:

> "However, your committee is convinced that the mental health and well-being of young children, as well as their ability to assimilate their English language and other required studies, can be seriously affected by the emotional disturbances, conflicts and maladjustments which are caused by compelling them to be learning two languages at the same time in their earlier years, especially where the differences are as great as those between English and an Oriental language." (From the report of the Committee on Education, Territorial Senate, March 30, 1943, R. 33, 37, in evidence by stipulation, R. 452.)

> "There is no doubt that the teaching of foreign languages in the past in this territory has impeded the teaching of children in the public schools. This is particularly true in the case of the oriental language schools, because a young child who is learning the English language and our alphabet is bound to have a difficult time simultaneously learning an oriental language which is a wholly different system of reading and writing." (From the report of the Committee on Education, Territorial House of Representatives, April 21, 1943, R. 37, in evidence by stipulation, R. 452.)

The witnesses likewise were testifying about the great body of children. To support the Court's finding

No. 13 (R. 112) there necessarily would have to be some competent testimony (a) drawing a line between the brighter and less bright children, with about half of the children in each group, and (b) taking the position that as to the brighter half, as distinguished from the lower half, there was no harmful effect from bilingual studies prior to passage of the fourth grade. The existence of such testimony would throw the case squarely upon the issue whether the court had the prerogative of accepting this testimony and rejecting the testimony which the legislature had accepted.[76] However, there was no testimony that the injurious effect of too early bilingual study depended upon whether the child was in the brighter or less bright half. The court's finding No. 13 therefore does not follow the line of testimony on either side, but on the contrary makes the court the sponsor of a brand new theory. Counsel for plaintiff-appellees advanced no such theory in the trial court.

The expert witness on the plaintiffs' side was testifying about all children:

> Dr. John E. Reinecke, teacher in the territorial public school system, testified that while "studies show that bilingualism is a retarding factor in the use of English" the relationship between such retardation and the Chinese and Japanese language school was "little or none;" that such retardation is "found among children who have not attended any school, pre-school children." (R. 213.) In his opinion there was no causal relationship between the teaching of foreign language in language school and emotional disturbances apparent "to one who has observed students over a period of a good many years."
>
> (R. 221)

[76] Part C of this point, supra.

The expert witnesses for the Territory likewise testified about all children, though reaching the opposite conclusion, that is, that there were various harmful effects to the general run of students from too early bilingual study:

> Dr. W. Harold Loper, Superintendent of the Department of Public Instruction for the Territory, testifying as to the language deficiency in the territorial schools, stated that the first grade teacher "frequently has as one of her serious problems the building up of a vocabulary with the children so that they can carry on the work of the schools."
>
> (R. 246)

> Dr. F. Deal Crooker, private school teacher and president, felt that it was "unsound" for children in the first four elementary grades to take up the study of a foreign language; that research indicates "that the child of elementary school age has not matured to the degree that he is able to take up a foreign language at such an early age."
>
> (R. 292)

> Dr. Bruce White, University of Hawaii professor, speaking of children generally, found that emotional disturbances and interferences with learning were caused by "trying to have the children learn two conflicting things at once."
>
> (R. 310)

> Mr. Richard E. Meyer, Assistant Superintendent of the Department of Public Instruction, found from "observing children in their language work especially" that the foreign language schools do interfere with the regular work in the public schools.
>
> (R. 320)

> Mr. Oren E. Long, then Acting Governor of the Territory and educator, testified that "on the

basis of my experience and observation and my knowledge of trends in the public and private schools of the United States, my opinion is that it would be in the best interest of the children not to start them at the same time in the study of their own language, that is, the English language, and in some foreign language."

(R. 344)

Mr. Emanuel Kwon, teacher and vice-principal in an elementary school of the Territory, said "I have noticed that most of the boys and girls that went to the language schools spoke a brand of English which was very much inferior to the other boys and girls."

(R. 365)

Dr. J. Robert Jacobson, clinical director of the Territorial Hospital, testified only as to children requiring psychiatric treatment, but his testimony tended to show that there was a close causal connection between emotional difficulty and language deficiency, and that a relatively large percentage of school children in the Territory require special assistance from his department.

(R. 370-385)

Mrs. Sarah Lee Yang, supervisor, Teacher's College, University of Hawaii, testified that in her opinion the study of a foreign language by children in the first four grades interferes with their regular school progress.

(R. 387)

Mr. Orin W. Robinson, Deputy Superintendent and Director of Curriculum, Department of Public Instruction, speaking of children generally, stated that there is a generalized English language deficiency in the territorial schools which interferes with the children's general progress in the schools; that postponement of the teaching and study of foreign languages until children had fin-

ished the first four grades would allow "a foundation of English control which would make it possible for the children then to branch out and carry heavier burdens."

(R. 392)[77]

The testimony of Dr. Madorah Smith clearly concerns the effects of bilingual study on the general run of students. Her testimony is discussed below.

The lower court's view that it had supported its construction of the word "average" as used in the legislative findings by reference (R. 85) to the sense in which the word is used by a witness, Dr. Madorah Smith, in part of her testimony adds nothing more to the case than reference to the dictionary, by which we have already developed that the word has a technical meaning of "mean average" as well as the meaning of "normal." The relevant question is, did Dr. Smith testify that bilingual study by children of tender age was injurious in the general run of cases? When her testimony is read as a whole, this is the clear purport of her testimony,[78] and the sentences quoted in the

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[77] And note testimony summarized in Part A, pages 63 to 68, supra.

[78] Examples of her testimony:

(1) From her own research in the Territory she found that "the children who had not been to foreign language school did over twenty per cent higher score on reading, on the reading tests", that those who had attended foreign language school showed more confusion in orientation tests, and over twice as many errors of reversal of words, and she concludes, "imagine the bewilderment of the six-year old child in Honolulu who starts to school and immediately is faced with the problem of trying to learn two languages, one beginning at the left on the top of the page and going

court's opinion are not contradictory."

east, and the other starting at the top right and going south." (R. 404-406.)

(2) She summarizes the opinions of various educators who recommend as to children in general that the study of a second language be postponed because more rapid progress can be made at a later age and to avoid confusion between the two languages (R. 407-408, 410-411); she agrees with the opinion of Saer of Wales, an authority, that "growth of vocabulary is relatively slow between five and nine years old" (R. 410); and states that "very few educators would advocate to any person at any age starting two languages at the same time." (R. 412.)

(3) She notes the prevailing practice in Scotland, Sweden, Switzerland and other countries to be to postpone the formal study of a second language until the child is ten years old or older. (R. 409.)

(4) In addition, she states that "the children who are trying to learn two languages at the same time are apt to become confused"; and "a child must be of exceptional ability if he is to learn two languages at the same time." (R. 413.)

She was there saying (R. 415) that the English speech handcap eventually could be overcome by the "bright" children, but about half the children never would overcome it. Her further testimony, immediately following, shows that though there is a gradual improvement in the upper grades, the children of Hawaii do not as a whole, even up to the twelfth grade, ever reach the mainland standard as to their English studies in general. Of course, even if a child by the time he finishes school speaks fairly good English, the problem has not been solved. It is necessary that the English handicap be overcome in the first school years, to lay the groundwork for the basic school studies. (Page 61, supra.) Otherwise there is ground lost which can never be regained.

E. The Provisions of the Statute Are Reasonable.

(This part of the argument further supports Specifications of Error Nos. 3 and 5, and covers Specifications of Error Nos. 9 and 10.)

That a legislature, having found an evil which may be met under the police power, must frame its corrective statute so that the requirements thereof are reasonably directed to meet the evil found to exist,[80] is conceded by appellants. The statute here involved conforms to this principle; moreover, the burdens it imposes on schools and parents are negligible. Such slight restrictions are fully justified by the need to relieve the children of the Territory from the added handicap put upon them by too early bilingual studies.

As to the school corporations, we have already pointed out in Part II hereof that there is every reason to expect that the schools will have substantially as many pupils if they now begin to operate under the law as they would have if the law were not in force. This is substantiated by the experience of a school which did open in compliance with the statute, and when the case was heard, was operating under the statute. (R. 359-360.)

With regard to the parents, the right for which they seek to establish protection is that of having their

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[80]The rule only requires that the provisions of the statute have a reasonable relation to the object of their enactment. The rule does not bring within the range of judicial cognizance the wisdom or unwisdom of the enactment, this being a matter for the judgment of the legislature. *Bayside Fish Co.* v. *Gentry*, 297 U.S. 422, 427-428.

children taught a foreign language (R. 80). If the children, though deferring their foreign language instruction until they have passed the fourth grade, nevertheless can and will learn the language satisfactorily, or at least to the same degree of accomplishment as they would if the delay of approximately four years were not required, the parents will not be deprived of the right they seek to protect.

Plaintiff-appellees did not endeavor to establish by any expert testimony that the effective study of a foreign language must be undertaken before a child reaches the age of ten years; defendant-appellants on the other hand, presented adequate and convincing evidence that the acquisition of the foreign language can be accomplished at least as well if not better, where an intensive course of study is not commenced until the age of approximately ten years or even later. (R. 250, 292-297, 347, 365-366, 397, 409, 412.) This is borne out by the studies made by educators in other countries, above cited.[81]

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[81] Part A. pp. 67-68. The following further studies are worthy of note:

A 1927 study by Buswell, comparing students who started French in elementary school and those who started in high school or college, concluded that the latter group made much more rapid progress. (R. 407-408.)

A study by Cole & Thorp pointed out that there was a tendency to delay the study of any foreign language until the ninth grade. (R. 411.)

Vasconnelles, in France, believes that children should wait until they are twelve years old for their second study. (R. 411.)

A report of the Committee on Modern Language in Great Britain stresses the importance of not beginning foreign language study too early. (R. 411.)

The attention of this Court is respectfully directed to the fact that the statute contains no restriction whatever on the use of the Chinese language by parents, by children, or by anyone; parents who wish to impart a knowledge of any foreign language to their children may readily adopt it as the language of the home, may have their children associate with others who use the language, or follow any similar procedure through which the children will acquire a familiarity with the language. The challenged statute makes no regulation of such matters, but is limited by its terms to the regulation of the formalized intensified study of the language, such study being what the Legislature expressly found to be harmful to children in their early and formative years, and which finding was abundantly supported by the evidence introduced by defendant-appellants.

The requirements of the statute, in so far as material to this case, are stated below. We have set forth our interpretation of the statute, which is a reasonable one. If this interpretation is disputed by plaintiff-appellees, then as previously submitted[*] the correctness of the interpretation is a matter that properly should be tried in an enforcement proceeding brought in the territorial equity court.

1. The statute defers commencement of foreign language study until passage of the fourth grade, as a general rule. Such study may be commenced at an earlier time, whenever a child is able to attain a score of 5.0 on standard tests in English composition and in reading. (R. 43-44, admitted in evidence R. 427; supra, pp. 44-45, 82-84.)

[*] Supra, Point IV, pp. 41-42, 44-49; Point III, p. 38.

2. A child need have only passing grades in English on the standard tests which are regularly given to school children, in order to continue with bilingual studies. (R. 43-44, admitted in evidence R. 427; R. 138, 141, 174, 176, 178, 242.)

3. A teacher of foreign languages must have a certificate that he is reasonably well versed in the usage and idiom of the foreign language to be taught by him. (Plaintiff-appellees did not challenge this requirement.)

4. A teacher of foreign languages must have a certificate that he is reasonably well versed in the usage and idiom of the English language. This means that the teacher must have enough English to be able to explain differences in usage and idiom between English and the foreign language (R. 35, Committee Report, received in evidence, R. 452).

5. The requirements of the statute cease to have any application as to all children attaining the age of fifteen years, or passing the eighth grade, whichever is the earlier.

6. The requirements of the statute operate only within the field of formal, intensified instruction; such as that of the classroom. Instruction by parents is not regulated by the statute. (R. 145.)[*] Mere con-

[*] As above noted, questions of interpretation should be settled in the territorial court. The territorial court would follow the rule of so construing the statute as to save its constitutionality. Note 33, *supra*, p. 46. Such is the rule in this court, *supra*, note 32, p. 46, particularly *Jacobson* v. *Massachusetts*, 197 U.S. 11, 38-39. Where a severability clause in a statute specifically provides that if applicability of the statute

versational usage of a foreign language, whether outside the home or within the family group, is not the subject of the statute. (There is not involved here any case of tutoring outside the classroom, except as presented by the parents, who were plaintiffs in the amended complaint, and who stated that they wished to teach their own children, a matter which the statute does not regulate.)

Items 1-4, *supra*, set forth the requirements of the statute, Items 5-6 being included to show the scope of operation of these requirements. Of the four requirements, one is not challenged, as above noted, and even under the lower court's opinion would fall only if the statute were an inseverable whole. To the contrary, each of the four requirements stands on its own merits. Invalidation of any one of them would not invalidate any of the others.

Questions of severability are interpretation questions, within the deference rule". The territorial courts

to any person or circumstance is held invalid, the applicability of its provisions to other persons and circumstances shall not be affected, such provision calls for a narrow construction, and "clearly evidences" the legislative intention "that any implication from the terms of the Act which would render them invalid should not be indulged". *Crowell* v. *Benson*, 285 U.S. 22, 63. The severability clause of the statute here involved contains just such a provision as was involved in *Crowell* v. *Benson*; the severability clause is set forth *infra*, p. 95.

"*Watson* v. *Buck*, *supra*, 313 U.S. 387, 396; *Rescue Army* v. *Municipal Court*, *supra*, 331 U.S. 549, 573; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572.

follow the rule of severability."

The statute has a severability clause, reading as follows:

> "Section 7. (Saving Clause.) If any portion of this Act, or the application thereof to any person or circumstances, shall be held to be unconstitutional or invalid, the remainder of this Act, or the application of such portion to other persons and circumstances, shall not be affected."

Appendix I"

Such a severability provision has great weight."

Upon review of the four requirements of the law (*supra*, Items 1-4) their severability appears, particularly in the light of the section of the statute above quoted. For example, the provision as to the time of commencement of foreign language study is not inseparably connected with the second requirement that having commenced such study, the child shall not continue the same if harmed thereby to the extent of failing to pass with his class in his English studies. Invalidity of the requirement that he maintain passing standards in English would not destroy the good accomplished by deferring bilingual studies until passage of the fourth grade and the intent of the legislature to at least maintain the provision against too early bilingual studies is clear. So also invalidity of the

"*Territory* v. *Tam*, 36 Haw. 32, 41; *In re Atcherley*, 19 Haw. 535, 542.

"This section remains in effect though not included in chapter 31 of the Revised Laws of Hawaii 1945, having been continued in effect by the act enacting the Revised Laws of Hawaii 1945, Act 1 of the Session Laws of Hawaii 1945, section 2 g.

"*Utah Power and Light Co.* v. *Pfost*, 286 U.S. 165, 184; *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 42.

requirement that the foreign language teacher be reasonably well versed in English, in order to be able to warn his young pupils against carrying over of foreign idiom into English (item 4, *supra*) would not invalidate the provision as to the time of commencement of foreign language study, which in itself would accomplish a great deal toward reaching the legislative objective.

CONCLUSION

An enforcement proceeding in a territorial court of equity, as provided in the statute, would have been the proper way of testing the statute. Once entertained, the case should have turned on the primary question of the power of the legislature to enact a statute deferring simultaneous instruction in English and a foreign language until passage of the fourth grade. Questions turning upon the interpretation of the statute, which the territorial courts have not had an opportunity to construe, should not have been considered, nor should the courts have considered hypothetical questions outside the issues framed by the amended complaint on the one hand and by the intended administration of the statute by the officers responsible therefor, on the other.

The question of the power of the legislature to enact a statute deferring simultaneous intensive study of English and a foreign language must be judged against the factual background. Admittedly, children in Hawaii come to school with a serious deficiency in English, the medium of instruction. Admittedly, progress in the basic school studies is retarded by this handicap in English. The school child in the early grades must overcome this handicap and lay the foun-

dation for his accomplishment of the basic school studies.

The early school years are the very time when, as found by a very substantial body of expert opinion, a child is unable to undertake a course of study in a foreign language simultaneously with his English studies. This is particularly true when the foreign language is as dissimilar from English as are the Oriental languages.

In seeking to relieve children of the confusion, emotional upset and retardation involved in too early bilingual studies, the legislature was acting as parens patriae. In other instances where parents have misguidedly handicapped their children this power of the legislature has been recognized, and the clear and present danger rule has not been applied.

Even though there was some evidence conflicting with the legislative findings, such findings were supported by substantial expert testimony and by evidence of prevailing educational practices. The legislature has the prerogative of adopting one or the other of two views in that situation. It is not for the courts to resolve the conflict of opinion.

The statute does not seek to and will not prevent the learning of foreign languages. A second language can be learned as well or even better if the intensive study of it is deferred until passage of the fourth grade, or even later.

The statute is not to be confused with those of twenty-five years ago or with the flag-salute regulations. Those were instances where the state sought to close the child's mind to foreign influences, and to shape

him in what was deemed to be the American ideal. The present statute is based on a principle recognized throughout the world, even in countries officially bilingual. It seeks to provide greater, not less, opportunities for learning.

The decree of the lower court should be reversed and the action dismissed.

Dated at Honolulu, T.H., this 7th day of December, 1948.

Respectfully submitted,

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APPENDIX I

ACT 104, Session Laws of Hawaii 1943 (Chapter 31, Revised Laws of Hawaii 1945)

AN ACT Regulating the Teaching of Foreign Languages to Children

Be it Enacted by the Legislature of the Territory of Hawaii:

(Sec. 1871) Section 1. *Declaration of legislative findings.* It is hereby declared that the study and persistent use of foreign languages by children of average intelligence in their early and formative years definitely detract from their ability properly to understand and assimilate their normal studies in the English language, which are required by law to be pursued by all children of school age, and definitely retard their progress in understanding and assimilating such studies; that the study and persistent use of such foreign languages in such early and formative years may and do, in many cases, cause serious emotional disturbances, conflicts and maladjustments; that the teaching of foreign languages compels and encourages the study and persistent use of such foreign languages, to the detriment, as aforesaid, of children in their early and formative years; that it is to the best interest, and will best promote the health and welfare, of children of tender age that such foreign language studies not be undertaken until each child shall have completed and passed at least the fourth grade or shall have attained the age of nine years, unless such child is earlier

able to speak, write and read the English language and has attained a test score of at least 5.0 on standard tests in composition and in reading; and that the teaching and study of foreign language to and including the eighth grade or the age of fifteen years should be regulated in the public interest to avoid the detrimental results herein set forth to which end each of the provisions of this Act shall be enacted.

(Sec. 1872) Section 2. *Definitions.* As used in this Act:

(a) "School" means any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice.

(b) "Public school" means a public school as defined in section 729 of the Revised Laws of Hawaii 1935.

(c) "Standard test" shall be the test which is so designated and determined by the department of public instruction from time to time from such tests as are generally recognized by educators.

(Sec. 1873) Section 3. (*Qualifications of pupils.*) No child shall be taught a foreign language in any school unless he shall comply with one of the following requirements: (a) That he shall have passed the fourth grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the department of public

instruction attaining a score not lower than normal for his grade; or (b) that he shall have passed the eighth grade in public school or its equivalent; or (c) that he shall have attained the age of fifteen years.

(Sec. 1874) Section 4. (*Qualifications of teachers; board of examiners.*) No school shall permit the teaching of any foreign language to any child under the age of fifteen unless the teacher shall have been examined and certified by a board of examiners of three persons appointed by the commissioners of public instruction to be reasonably well versed in the usage and idiom of both the English language and the foreign language to be taught by such teacher. The commissioners of public instruction shall appoint one or more of such boards of examiners as may be necessary. Of the members of each such board, at least two shall be well versed in the usage and idiom of both the English language and the foreign language to be taught by the teacher to be examined, and the third shall be well versed in the usage and idiom of at least one of said languages. Such board shall examine each applicant to teach such foreign language. If such applicant is found to be qualified pursuant to this section, such board shall so certify to the commissioners, who shall cause a certificate of such qualification to be issued to such teacher. No charge shall be made for such examination and certification. The expenses of such boards of examiners, including compensation, if any, allowed by the commissioners of public instruction, shall be paid out of any appropriations for the department of public instruction for general administration or teachers' salaries, or both.

(Sec. 1875) Section 5. (*Inspection by department of public instruction.*) Any supervising principal, or

other duly authorized representative of the department of public instruction of the Territory, at any time during which such school is in operation, shall have power to attend any school, for the purpose of ascertaining whether the provisions of this Act are being complied with, and it shall be the duty of every person in charge of, or employed at, such school to permit such representative of the department at any such time to attend the classes and activities of such school for said purposes.

(Sec. 1876) Section 6. (*Proceedings to ensure compliance; duties of attorney general and county attorneys.*) In the event any school or any person shall be found to be violating, or failing to comply with any of the requirements of this Act, or there shall be reasonable cause to believe that such school or person is violating, or failing to comply with the requirements of this Act, the attorney general, at his own instance or at the request of the department of public instruction, shall institute appropriate proceedings in equity in the circuit court in which the violation occurs to enjoin the performance of any acts or practices forbidden by this Act, or to require such school or person to comply with the requirements of this Act. Jurisdiction to hear and dispose of all actions under this section is hereby conferred upon each circuit court, and each such court shall have power to issue such orders and decrees, by way of injunction, mandatory injunction or otherwise, as may be appropriate to enforce the provisions of this Act. In the event any respondent or respondents shall fail or refuse to comply with any such order or decree, the court, in addition to any other powers hereby granted, shall have power to enjoin the operation and conduct of such

school until and unless this Act is complied with or satisfactory assurance is given that this Act will be complied with. The county attorney of each county shall, at the request of the attorney general, conduct such proceeding in behalf of the Territory. All such suits shall be brought in the name of the Territory by the attorney general.

Section 7. (Saving clause.) If any portion of this Act, or the application thereof to any person or circumstance, shall be held to be unconstitutional or invalid, the remainder of this Act, or the application of such portion to other persons and circumstances, shall not be affected.

Section 8. This Act shall take effect upon July 1, 1943.

APPENDIX II

U. S. Code—Title 48

Territories and Insular Possessions

(Sec. 86 of the Hawaiian Organic Act, as it read at the time of adjudication of the case below.)

Sec. 641. District court; session; powers; terms.

There shall be established in the Territory of Hawaii a district court, to consist of two judges, who shall reside therein and be called district judges, and who shall each receive an annual salary of $10,000. The two judges shall from time to time, either by order or rules of the court, prescribe at what times and in what classes of cases each of them shall preside.

The two judges may each hold separately and at the same time a session of the court (whether at the

same or different terms of court, regular or special) and may preside alone over such session. The said two judges shall have the same powers in all matters coming before the court; and in case two sessions of the court are held at the same time, the judgments, orders, verdicts, and all proceedings of a session of the court, held by either of the judges, shall be as effective as if one session only were being held at a time.

Regular terms of said court shall be held at Honolulu on the second Monday in April and October, and special terms may be held at such times and places in said district as the said judges may deem expedient. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; July 9, 1921, ch. 42, § 313, 42 Stat. 119; Feb. 12, 1925, ch. 220, 43 Stat. 890; Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919; July 31, 1946, c. 704, 60 Stat. 716.)[1]

Sec. 642. Jurisdiction of district court; authority of officers.

The said court shall have the jurisdiction of district courts of the United States, and shall proceed therein in the same manner as a district court; and the said judges, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district courts of the United States. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; Mar.

[1] Deleted by the amendment of section 86 made by Public 773, 80th Cong., 2d Sess., c. 646, s. 8, effective September 1, 1948.

3, 1911, ch. 231, § 291, 36 Stat. 1167; July 9, 1921, ch. 42, § 313, 42 Stat. 119.)

Sec. 643. Appointment and term of office of judges, district attorney, and marshal.

The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint two district judges, a district attorney, and a marshal of the United States for the said district, all of whom shall be citizens of the Territory of Hawaii and shall have resided therein for at least three years next preceding their appointment. Said judges, attorney, and marshal shall hold office for six years unless sooner removed by the President. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; July 9, 1921, ch. 42, § 313, 42 Stat. 119.)

Sec. 644. Salaries of clerk and reporter; deputy clerk.

A clerk of the district court shall be appointed as provided in section 6 of Title 28, at a salary to be fixed in accordance with section 558 of Title 28. The number and compensation of deputy clerks shall be fixed by the attorney general as in other judicial districts. The said district judges shall appoint a reporter of said court at a salary of $1,200 per annum. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1412; July 9, 1921, ch. 42, § 313, 42 Stat. 119; June 1, 1922, ch. 204, title II, 42 Stat. 614, 616; Jan. 3, 1923, ch. 21, title II, 42 Stat. 1084.)

Sec. 645. Appeals.

Appeals from the said district court shall be had and allowed to the circuit court of appeals for the

ninth judicial circuit in the same manner as appeals are allowed from district courts to circuit courts of appeal as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; July 9, 1921, ch. 42, § 313, 42 Stat. 119; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54.)

APPENDIX III

Legislative History

8 U.S.C. Sec. 43 and former Title 28 U.S.C. Sec. 41(14)

The derivation of the substantive provision, 8 U.S.C. Sec 43, is indicated in the annotations to the section in both the United States Code and the United States Code Annotated and has been traced by the courts, as in *Hague* v. *Committee for Industrial Organization*, 101 F. 2d 774 (C.C.A. 3d), at p. 788; in the same case, 307 U.S. 496, at p. 510; and in *Screws* v. *United States*, 325 U.S. 91, at p. 99, n. 8. Said section is derived from Rev.

The first sentence was deleted and the second sentence substantially reenacted by the amendment of section 86 made by Public 773, 80th Cong., 2d Sess., c. 646, s. 8, effective September 1, 1948.

Stat. Sec. 1979, which in turn was derived from section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13. These successive provisions are herein set out in full, beginning with the present United States Code:

"Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

8 U.S.C. Sec. 43

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Rev. Stat. Sec. 1979

"* * * That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several

district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication'; and the other remedial laws of the United States which are in their nature applicable in such cases."

Sec. 1 of Act of April 20, 1871, 17 Stat. 13

For the purposes of this case, the noteworthy change was in the addition in the Revised Statutes of the words "or Territory" after the word "State". Whatever may have been the reason for the insertion by the revisors the words may not be disregarded but must be taken as part of the existing law. *United States* v. *Bowen*, 100 U.S. 508.

The derivation of the jurisdictional provision, 28 U.S.C. Sec. 41(14), has likewise been noted in annotations to the section as well as in judicial opinions. In an opinion by Mr. Justice Roberts in *Hague* v. *Committee for Industrial Organization*, *supra*, 307 U.S. 496, at page 508, note 10, its history is traced as follows:

"The section is derived from Rev. Stat. § 563, 28 U.S.C.A. § 41 (14), par. 12, which, in turn, ori-

While it is immaterial whether the word "State" as used in the original act would have been construed to include the territories or whether the insertion enlarged the scope of the law, it is noteworthy that, as the cases already cited show, the Civil Rights Act was enacted in effectuation of the Fourteenth Amendment, which applies to States.

ginated in § 3 of the Civil Rights Act of April 9, 1866, 14 Stat. at L. 27, chap. 31, as reenacted by § 18 of the Civil Rights Act of May 31, 1870, 16 Stat. at L. 144, chap. 114, and referred to in § 1 of the Civil Rights Act of April 20, 1871, 17 Stat. at L. 13, chap. 22."

The successive provisions referred to (except Sec. 1 of Act of April 20, 1871, 17 Stat. 13, hereinabove quoted) read as follows, beginning with the former Title 28 of the United States Code:

"The district courts shall have original jurisdiction as follows: * * *

Suits to redress deprivation of civil rights. Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

28 U.S.C. Sec. 41(14)

"* * * the district courts shall have jurisdiction as follows: * * *

Twelfth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof."

Rev. Stat. Sec. 563

"* * * That the district courts of the United States, within their respective districts, shall have

exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be

extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty."

Sec. 3 of Act of April 9, 1866, 14 Stat. 27

"* * * That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act."

Sec. 18 of Act of May 31, 1870, 16 Stat. 144

Unlike the substantive section, the jurisdictional section, in both the United States Code and Revised Statutes versions, referred only to deprivation under color of state authority, as distinguished from deprivation under color of territorial authority. The question is whether the action of the revisors, in expressly providing for rights of action for deprivations of civil rights under color of territorial authority, should be set at naught for failure to provide a forum for the enforcement of such rights. Such a conclusion could be avoided either by construing the word "state" as used in the jurisdictional section to include the territories, as in *Andres* v. *United States*, cited in the text of this brief, or by determining that paragraph 14 applied to the Territory of Hawaii by virtue of the then provisions of the Hawaiian Organic Act, giving this court the jurisdiction and procedure of a District Court of the United States. Of course Hawaii was not a territory when the Revised Statutes were enacted in 1873. But other territories existed, and it is pertinent to determine what the revisors who inserted the word "terri-

tory" in what is now section 43 of Title 8, U.S.C. (R.S. 1979) intended as to a forum for the enforcement of civil rights in the territories. In the Revised Statutes the jurisdiction of the district courts in the territories was defined as follows:

> "Each of the district courts in the Territories mentioned in the preceding section shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States; and the first six days of every term of the respective district courts, or so much thereof as is necessary, shall be appropriated to the trial of causes arising under such Constitution and laws; but writs of error and appeals in all such cases may be had to the supreme court of each Territory, as in other cases."
>
> Rev. Stat. Sec. 1910
>
> (The territories mentioned in Rev. Stat. Sec. 1909 were New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana and Wyoming.)

Therefore, it is reasonable to suppose that the revisors did not insert the word "territory" in what became paragraph 14 of section 41, former Title 28 of the U.S. Code (R. S. 563), because R. S. 1910 made it unnecessary to do so. By like reasoning, the provisions of the Hawaiian Organic Act made it unnecessary for the word "territory" to appear in paragraph 14 of section 41 in order that this paragraph might apply to the Territory of Hawaii.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 52 52

INGRAM M. STAINBACK, GOVERNOR OF THE TERRITORY OF HAWAII; WALTER D. ACKERMAN, JR., ATTORNEY GENERAL OF THE TERRITORY OF HAWAII, AND W. H. LOPER, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE TERRITORY OF HAWAII, *Appellants,*

vs.

MO HOCK KE LOK PO, AN ELEEMOSYNARY CORPORATION; DAI KUNG CHINESE SCHOOL, AN ELEEMOSYNARY CORPORATION, ET AL., *Appellees*

REPLY BRIEF FOR APPELLANTS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 52

INGRAM M. STAINBACK, GOVERNOR OF THE TERRITORY OF HAWAII; WALTER D. ACKERMAN, JR., ATTORNEY GENERAL OF THE TERRITORY OF HAWAII, AND W. H. LOPER, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE TERRITORY OF HAWAII, *Appellants,*

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REPLY BRIEF FOR APPELLANTS

Introductory Statement

This brief is being submitted in accordance with the order made by the Court during the oral argument, allowing one week's time for the filing hereof. This brief is not intended as a comprehensive answer to the arguments set forth in the briefs of Appellees and the several friends of the Court, but will be limited to a "high-lighting" of those points as to which we believe clarification may serve some useful purpose. This brief will likewise restate the position of the

Attorney General of Hawaii that the statute does not apply to a parent who instructs his children in the home in a foreign language, and that religious instruction, where a foreign language is used, is not within the statute, and no action to enjoin any such practice could or would be brought.

Appellants respectfully submit to the Court that the extensive arguments in the several briefs of Appellees and Amici have already been adequately treated and answered in our opening brief.

The Argument

I. The Claim of "Racism" in the Statute Is Groundless

It is well-known that the racial harmony existing in Hawaii is without equal elsewhere. Hawaii is a community which has always taken justifiable pride in its freedom from the evil of race prejudice. A committee of the Congress, after a thorough Territory-wide investigation concluded: "Its different racial groups live together with a minimum of friction and no racial clashes * * *" (H. R. Rep. No. 1620, 79th Cong. 2d Sess., report of subcommittee of the Committee on the Territories, Finding No. 10, being Appendix 4 of H. R. Rep. No. 194, 80th Cong. 1st Sess., referring to the subcommittee report at p. 11.)

The statute itself plainly applies to all persons coming within its reasonably regulatory provisions, without regard to race or color. The problem involved in the handicap placed upon children by bilingual studies at too early an age, was shown to be accentuated when the second of the two languages is an oriental language. Such a finding or observation by the Legislature simply can not constitute "racial hostility" in any sense of that term.

II. The Cases * Principally Relied upon by Appellees do Not Apply

It is submitted that this proposition has been adequately treated in Appellants' Opening Brief, pages 70-72, and it will not be restated herein. Appellants do, however, wish to call again to the attention of the Court, the plainly distinguishable objectives and regulations of the earlier statutes and the one involved in the present case. This is particularly true in considering the statute involved in the *Farrington* case, which was essentially a program of censorship of the content of what was taught in the language schools, together with extensive regulations designed to carry out such censorship. The *Farrington* case simply did not present any issue as to the authority of the Territory reasonably to defer the undertaking of intensive bilingual language studies so as to protect the very young children from the handicaps thereby imposed.

III. The Severability of the Statutory Regulations Is Clear

Upon the question of severability, the decisions in *Thornhill* v. *Alabama*, 310 U. S. 88, and *Thomas* v. *Collins*, 323 U. S. 516 (Appellees' Brief, p. 42), merely hold that the conviction of a defendant in a criminal case cannot be sustained where an invalid part of the statute has been used against him even though he possibly could have been tried and convicted under some other part of the statute, not invalid. See *Cole* v. *Arkansas*, 333 U. S. 196.

Appellants respectfully submit, or resubmit, that each of the requirements of the statute is separable from the others, and should be so regarded in consideration of this

---

* *Farrington* v. *Tokushige*, 273 U. S. 284;
Meyer v. *Nebraska*, 262 U. S. 390;
Pierce v. *Society of Sisters*, 268 U. S. 510;
West Va. State Bd. of Education v. *Barnette*, 319 U. S. 624.

case. Thus this Court could find that the necessity of the requirement, that the teacher of Chinese pass an examination in English, is not supported by any evidence, but such finding plainly could have no relation to the requirement of deferral of bilingual studies for the reasonably short period of four years.

IV. The Doctrine of Deference Is Applicable

Beginning at p. 43, Appellees' Brief exemplifies the need for application of the deference rule. Whether or not the statute is unconstitutional for failure of the Legislature to adopt measures reasonably directed to the evil to be met could only be determined after the statute was interpreted by the Territorial Courts. We submit that our interpretation of the statute establishes it as reasonable (Appellants' Opening Brief, pp. 92-94). Arguments that it was inconsistent for the Legislature not to apply the statute to one child taught alone (Paragraph "Third," p. 44 of Appellees' Brief), and that there may be some children, not bilingual, as to whom the arguments in support of the legislation do not apply to the same great degree as those arguments apply to others, such as the parties in this case—such arguments are typical of instances where those who feel themselves to be the ones against whom a statute is chiefly directed have attacked it because of its effect in extremely minor instances which it would be or may be impracticable to bring within the scope of the statute, or impracticable to except from its scope. This Court has frequently stated that a statute cannot be invalidated by this species of attack. See: *People* v. *Charles Schweinler Press*, 214 N. Y. 395, 108 N. E. 639, writ of error dismissed, 242 U. S. 618; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201; *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303; *Fairmont Co.* v. *Minnesota*, 274 U. S. 1, 11.

The application of the doctrine of deference in this case was indicated in our opening brief, Point IV. The doctrine does not apply to the primary issue as to whether it is competent for the Legislature to reasonably defer bilingual instruction. The doctrine does apply to the question whether the terms of the statute as it has been framed are reasonably directed to meet the evil found by the Legislature. Appellees do not confine their attack upon the statute to the primary issue above stated. In seeking to place upon the statute interpretations which would invalidate it, when reasonable interpretations which might readily be placed upon it in the Territorial courts would show that the statute is reasonably directed to meet the evil found by the Legislature, Appellees' arguments demonstrate the need for applying the doctrine of deference. The reason why Appellants had been prevented from proceeding in the Territorial Court and staying the litigation in the Federal Court, under the terms of Sec. 266 of the Judicial Code, have been stated in footnote 36, page 48 of our opening brief.

As to the doctrine of deference, Appellees chiefly rely on *King* v. *United Commercial Travelers*, 333 U. S. 153; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *Meredith* v. *County of Winterhaven*, 320 U. S. 228; and *Markham* v. *Allen*, 326 U. S. 490 (Appellees' Brief, p. 67). These cases do not involve the doctrine of abstention, of which the doctrine of deference is a part. None of these cases involves an attack on a state statute under the Constitution of the United States. The rule that a Federal court will not, under the Constitution of the United States, invalidate a state statute when the interpretation of the local law may be such as to eliminate the particular constitutional issue, is the rule of *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, and it is on this case and the line of cases stemming from it that we rely.

V. Allegations That the Statute Is "Too Broad and Sweeping" Are Insupportable

The contention made by Appellees in their Brief, pages 30-32, simply misses the point that the Hawaiian statute is appropriate to its own objective, which is different from the objectives of the earlier statutes. That the statutory definition of the term "school" is broad enough to include private tutoring is consistent with the purpose of the statute, which is the deferral of bilingual instruction of very young children. This was not the objective in the *Meyer* case, and the fact that the statute there involved applied only to the regular schools and only to modern languages, was the very reason why the Court said that the statute had nothing to do with the protection of the child's health by limiting his mental activities (262 U. S. at p. 403).

VI. The Great Freedoms of the First Amendment Are Not Involved in This Case, Nor Is the Exercise of Them Interfered With by the Statute

Appellants respectfully remind the Court that the statute was challenged only under the Fifth Amendment. Appellants further state that the great freedoms of religion and speech are not interfered with by the provisions of the statute or by the intended application of the provisions. And Appellants likewise submit that even if there should be any suggestion or feeling that rights protected by the First Amendment are or may possibly become involved (with which we earnestly disagree), then the decision of the Court in *Prince* v. *Massachusetts*, 321 U. S. 158, is clearly applicable here and the clear and present danger rule does not apply.

Appellants have heretofore taken, and do hereby restate, their position that the teaching of religious matter, in which

a foreign language is used, and the teaching of a foreign language by a parent to his children in the home, are not within the contemplation of the statute. The Attorney General of Hawaii heretofore stated, and does hereby state, that no action or proceeding will be brought to enjoin any person from teaching religious matter to children, in which teaching a foreign language is used, nor to enjoin any parent from teaching a foreign language to his children in the home, nor to enjoin any person from using a foreign language at any time.

Conclusion

The decree of the lower court should be reversed and the action dismissed.

Dated at Washington, D. C., this 17th day of January, 1949.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 789

INGRAM M. STAINBACK, WALTER D. ACKERMAN, JR., AND W. H. LOPER,

Appellants,

vs.

MO HOCK KE LOK PO, AN ELEEMOSYNARY CORPORATION; DAI KUNG CHINESE SCHOOL, AN ELEEMOSYNARY CORPORATION; CHUNG SHAN CHINESE SCHOOL ASSOCIATION, AN ELEEMOSYNARY CORPORATION; WAH CHAN THOM, WILFRED CHONG AKD LEONG NGET CHO,

Appellees

APPELLEES' STATEMENT AS TO JURISDICTION

The appellees accept the statement of the case, as set forth in the Appellants' Jurisdictional Statement. This Court manifestly has no jurisdiction over the instant appeal. The appeal herein is improvidently and erroneously taken to this Court.

Under the express and clear provisions of Section 128 of the Judicial Code (28 U. S. C. Sec. 225), the appellants' appeal is to the Ninth Circuit Court of Appeals, not to this Court. For that section of the Judicial Code explicitly provides that appellate jurisdiction to review final judg-

ments of the District Court for Hawaii (as in the case of appeals from the District Court for Puerto Rico), in all cases, shall be to the Court of Appeals, *not* to this Court.

It is to be noted that Section 128 expressly contains a distinction between United States District Courts generally on the one hand, and the District Courts for Hawaii and Puerto Rico on the other hand. In so far as the United States District Courts generally are concerned, a direct review is saved to this Court under Section 238 of the Judicial Code (8 U. S. C. Section 345); no such reservation appears in Section 128 so far as the United States District Courts for the Territories of Hawaii and Puerto Rico are concerned.

Moreover, the Act of February 13, 1925 (44 Stat. 946, C. 229) by Section 13, provided for repeal of "so much of the Hawaiian Organic Act, as amended by the Act of July 9, 1921, as permits a direct review by the Supreme Court of cases in the courts in Hawaii."

It would seem clear that Congress, by express statutory enactments, has declared that an appeal from the Territory of Hawaii shall be to the Circuit Court of Appeals and not to this Court; and that these statutory declarations apply to the instant case. (Cf. historical note to 8 U. S. C. Section 225, appearing at 8 U. S. C. A. Section 225 (at p. 296)).

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Supreme Court of the United States

October Term 1948

No. 52

INGRAM M. STAINBACK, Governor of the Territory of Hawaii, WALTER D. ACKERMAN, JR., Attorney General of the Territory of Hawaii, and W. H. LOPER, Superintendent of Public Instruction of the Territory of Hawaii,

Appellants,

vs.

MO HOCK KE LOK PO, an eleemosynary corporation, DAI KUNG CHINESE SCHOOL, an eleemosynary corporation, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, an eleemosynary corporation, WAH CHAN THOM, WILFRED CHONG and LEONG NGET CHO,

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IN THE

Supreme Court of the United States

October Term 1948

No. 52

INGRAM M. STAINBACK, Governor of the Territory of Hawaii, WALTER D. ACKERMAN, JR., Attorney General of the Territory of Hawaii, and W. H. LOPER, Superintendent of Public Instruction of the Territory of Hawaii,

Appellants,

vs.

MO HOCK KE LOK PO, an eleemosynary corporation, DAI KUNG CHINESE SCHOOL, an eleemosynary corporation, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, an eleemosynary corporation, WAH CHAN THOM, WILFRED CHONG and LEONG NGET CHO,

Appellees.

BRIEF FOR APPELLEES.

The Opinions Below.

The opinion of the Three-Judge District Court of the District of Hawaii, holding unconstitutional Hawaii's Language School Law is reported at 74 Fed. Supp. 852, and appears at Record 77. The opinion of that Court sustaining its jurisdiction as a Three-Judge Court is reported in 74 Fed. Supp. 852, and may be found at Record 87, the dissenting opinion appearing at Record 93.

Jurisdiction.

The jurisdictional statement appearing in Appellants' Brief (p. 2) is adequate; and is not repeated herein.[1]

[1]The jurisdictional problems in the case are discussed later.

Statement of the Case.

The appellants' statement of the case is accepted by the appellees. A brief further statement as to the import of the Hawaiian Statute[2] whose constitutionality is challenged by the appellees herein follows:

The Hawaiian statute prohibits the teaching of a foreign language (Sec. 1873) in any school (as defined by the statute, Sec. 1872), to any child, unless the child (1) passes the fourth grade, and (2) after the fourth grade passes from time to time certain tests described in the statute, or (3) has passed the eighth grade, or (4) has attained 15 years of age.

School is broadly defined (Sec. 1872) not only to include formal or organized schools, but to encompass "any person . . . which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice.[3]

The statute is prefaced by a "Declaration of Legislative Findings" (see Appellants' Br., Appendix I, p. 99) as to the alleged harmful effects upon children resulting from study of foreign languages under certain circumstances.

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[2]Act 104, Session Laws of Hawaii, 1943, now Chap. 31, Revised Laws of Hawaii, 1945 (set forth in Appendix I, Appellants' Brief, p. 99, hereafter to be referred to as "B").

[3]The Three-Judge Court below, speaking through Judge William F. Denman Presiding Judge of the Court of Appeals for the Ninth Circuit, called the definition of "school" in Sec. 1872 an "extraordinary definition." The unconstitutionality of the statute because of the extraordinary definition of "school" will be discussed later.

Summary of Argument.

The statute is unconstitutional in that it deprives the appellees of liberty and property without due process of law in violation of the Fifth Amendment; and of freedoms guaranteed by the First Amendment.

The statute is racist in purpose and effect. The reasons advanced in support of the statute are unsubstantial; the statute is unconstitutional, additionally and more particularly, in that it is too broad and sweeping in its terms. Measured by the clear and present danger rule, it is wanting in constitutional support.

With respect to the procedural points urged by the appellants, the United States District Court had jurisdiction over all appellees pursuant to both 28 U. S. C. 41(1) and (14). This is a proper case for equity to act because of the irreparable injury that will befall appellees if relief is not afforded. This being an adversary proceeding and there being a controversy over the constitutionality of the Territorial Act, a declaratory judgment is proper. Judicial Code Section 266 imposes a positive duty on the part of appellants to seek Territorial adjudication. Not having done so, they cannot now prevent a decision on the merits. In any event, no exceptional circumstances or specific statutory prohibition have been shown as to why the District Court or this Court should not adjudicate the merits.

ARGUMENT.

I.

The Statute Is Unconstitutional in That It Deprives the Appellees of Liberty and Property in Violation of the Fifth Amendment; and of Freedoms Guaranteed by the First Amendment.

A.

The Statute is Racist in Purpose and Effect.[4]

While differing in text in many of its provisions from its 1923 predecessor,[5] the 1943 act is of the same pattern. Both were based on prejudice against the Japanese; both were aimed primarily against the Japanese.[6] With respect to both statutes, elaborate rationalizations ill conceal their manifest racism. The former act was a post-World War I statute, and, part of a nationwide campaign result-

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[4]Hence, it comes before this Court "suspect." Cf. *Korematsu v. United States*, 323 U. S. 214, 216.

[5]The 1923 act was held unconstitutional in *Farrington v. Tokushige*, 273 U. S. 284.

The instant statute is more vulnerable constitutionally, because more sweeping in its provisions. This will be considered later.

[6]The *Farrington* case has been cited as involving a statute directed against a minority racial group.

Cf. Chief Justice Stone in *Minersville v. Gobitis*, 310 U. S. 586, 606; also in *United States v. Carolene Products*, 304 U. S. 144, 152, note No. 4.

In the *Farrington* case this Court recognized that the statute was leveled against the Japanese for the Court stated (at p. 298):

> "The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue."

ing in the adoption of statutes by twenty-one states[7] urging English as our "mother tongue."[8]

The present statute was adopted during World War II. Just as the 1923 act was part of the then nationwide campaign to foster "Americanism," and was a repercussion of California's anti-Japanese campaigns, so the present statute is a backwash in Hawaii of anti-Japanese baiting

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[7]The brief in behalf of the State of Nebraska, in *Meyer v. Nebraska*, 262 U. S. 390, No. 325, 1922 Oct. Term, contains a list of the twenty-one states enacting legislation aimed at the study of the German language.

Professor Percival M. Symonds, in the only generally acknowledged scientific study of the language schools in Hawaii, said of the then attitude towards the Oriental language schools in Hawaii that:

> "This is one aspect of the broad wave of Americanization which was one of the results of the World War but is intensified by the persistent hostility of California to the Oriental on the Western coast."

(Professor Symonds' study is called, "The Effect of Attendance at Chinese Language Schools on Ability with the English Language." It was published in Journal of Applied Psychology, Vol. VIII, No. 4, p. 411, December 1924. It is in evidence as Plaintiffs' Exhibit C, R. 507. It was submitted to a Congressional Committee by Dr. R. E. Long, Superintendent of Public Instruction of the Public Schools of the Territory of Hawaii, and was declared by W. Harold Loper, then supervising principal of the Honolulu schools, as "the only objective study of this problem which I have seen." (Hearings before the Sub-Committee of the Committee on the Territories, House of Representatives, 74th Congress, 1st Session, on H. R. 3034, p. 82. Portions of the hearings are in evidence as Plaintiffs' Exhibit H, R. 553, 556.))

In the course of the same hearings, Dr. Long submitted a statement of Dr. William H. George [R. 556], Dean of the College of Arts and Sciences of the University of Hawaii, in which Dr. George said of the 1923 statute that "the attempt to abolish these Japanese language schools was the result of hysteria, and was not based upon a thorough investigation and clear thinking."

[8]In *Meyer v. Nebraska* (at p. 401) this Court observed that the purpose of the Nebraska statute was "that the English language should be and become the mother tongue of all children."

in California during World War II. Thus, California saw the revival of the enforcement of its Alien Land Law;[9] and the adoption of legislation barring Japanese from fishing;[10] Hawaii contented itself with a resurrection of its anti-Japanese language school legislation.

Moreover, enacted during the war, the present statute was adopted in the course of a vigorous "Speak American" campaign in the Territory.

Thus, in its Report urging the adoption of the present statute, the Territorial Senate Committee on Education[11] stated that "the number of foreign language schools in the Territory, as defined in the bill, which teach any foreign language other than an Oriental language to students under senior high school age or under the eleventh grade are practically nil, and none of them so far has expressed any opposition to the bill. The overwhelming majority of schools which teach foreign languages, therefore, are those which teach the Oriental languages, Japanese, Chinese and Korean, the latter being very few in number, but the Japanese language schools having been most plentiful until they were closed at the commencement of the present war. None of the Japanese language schools is operating at present due to the fact that they were all closed under martial law. It is, therefore, apparent that the regulation of foreign language schools, other than the Oriental lan-

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[9]*Cf. Oyama v. California*, 332 U. S. 633.

[10]*Cf. Takahashi v. Fish and Game Commission*, 92 L. Ed. (Adv. Op.) 1096.

[11]Report of the Committee on Education (of the Territory of Hawaii) of the Senate Twenty-Second Legislature, Regular Session of 1943, on Senate Bill No. 158, entitled "An Act to Regulate the Establishment and Operation of Foreign Language Schools" (Stan. Com. Repl. No. 123), Senate Journal 1943, pages 363-365. The Report is in evidence by stipulation [R. 452]; its text is at R. 33.

guage schools in the Territory, presents no difficult problem. Rather it is the Oriental language schools which in the past have presented and will in the future constitute, a grave problem from the standpoint of the children's welfare"[12] [R. 34].

It is clear, thus far, that the statute is aimed at Oriental schools.

The Senate Committee then showed its racist hand, however, when it observed:

> "While there is strong reason to believe that the Japanese language schools in the past have been a means of disseminating detrimental propaganda from foreign sources to the young children, your committee does not assume to try to remedy the situation from that standpoint, inasmuch as the question of what theories, ideas and ideals should be taught in private schools in one which is difficult to regulate without impinging upon the freedom of speech and personal freedom guaranteed by the constitution" [R. 34].

The repetition of an apparent belief by the Senate Committee in a claim which has definitively been repudiated by Hawaii's leading educators and by its responsible public officials, and implicitly rejected by this Court[13] is explainable only in terms of race prejudice.

Thus, in 1935, Dr. Long in his appearance before a Congressional Committee inquiring into the problem of

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[12]In 1940, there were 165 Japanese language schools, eight Chinese [R. 450, 68, 85]. The five Korean language schools (always few in number) had voluntarily ceased operation in 1940, prior to the declaration of martial law [R. 450].

In 1923, there were a total of "163 language schools in the Territory," nine Korean, seven Chinese, 147 Japanese. *Farrington* case at p. 290.

[13]In the *Farrington* case.

statehood for Hawaii [Pltf. Ex. "H," R. 554] represented that his testimony reflected pretty accurately the attitude of all of Hawaii's public school teachers [R. 353, 354]. Specifically, with respect to the alleged subversiveness of the Japanese language schools in Hawaii, he testified [R. 555]:

> "The question of loyalty brings up the topic of the language schools—particularly the Japanese language schools. From the standpoint of public opinion, both in Hawaii and on the mainland, the presence of these schools is regrettable. From the standpoint of their possible effect on citizenship, they are likely of no greater significance than the language schools of the mainland that were usually established when considerable number of any cultural group settled in the Middle Western States, particularly the German and Scandinavian groups. The history of all such schools has been that they are gradually eliminated. The second and third generations lose interest in them. There is no reason to believe that the local groups will prove to be exceptions in this respect."

He then submitted statements from "representative educators" bearing on the language school problem [R. 555]. The first was from A. L. Dean, former President of the University of Hawaii from 1914 to 1929. Dr. Dean, according to his statement [R. 555] served on the "Interracial Committee on Foreign Language Schools" which studied these institutions. Of them, he said [R. 555]:

> "'With respect to the Japanese language schools, I am pretty well satisfied on the following:
>
> "'(a) They are not sponsored nor controlled by the Japanese government.
>
> "'(b) Their purpose is not to inculcate loyalty to Japan, but is cultural and social.

"'(c) Attendance is not due to the desire of the children but of their parents.

"'(d) The chief motives of the parents are: (1) Desire that their children shall learn to read, write, and speak good Japanese and thus allow closer family ties; (2) desire that their children be instructed in good manners and gain some appreciation of Japanese culture; (3) desire that the children be kept occupied and out of possible mischief outside regular school hours.

"'(e) That the loyalty of the children to the United States is not seriously affected.'"

W. Harold Loper, supervising principal of the Honolulu schools and in school work in Hawaii since 1922, stated [R. 556]:

"'It is my opinion that the foreign-language schools of Hawaii are not un-American nor sponsored for nationalistic motives.'"

Similarly, Dr. William H. George, Dean of the College of Arts and Sciences of the University of Hawaii since 1930, said of the Japanese language schools [R. 556]:

"'In regard to the propriety of Japanese language schools in Hawaii, I am convinced that they do not constitute a menace; rather, they are a benefit to our community. They are prompted by cultural and religious motives and not by rampant nationalism. Their aim is to perpetuate the language and culture of Japan. They make no attempt to wean American citizens away from their loyalty to the United States. They do not seek to displace our public-school system, but rather to supplement it.

"'I wish to go on record, therefore, as favoring the Japanese language schools in Hawaii.'"

O. W. Robinson, supervising principal of the rural Oahu schools and deputy superintendent of schools [R. 557], discussing particularly the language schools and their "effect upon Americanization" said [R. 557]:

> "'So far as I have observed, there is no anti-Americanism in the teachings of these schools.'"

Miles E. Cary, principal of McKinley High School, expressed the view that [R. 557]:

> "'During all of my experience with the young people of Japanese ancestry at this school, I do not recall a single circumstance where a pro-Japanese or anti-American sentiment became apparent among them.'"

Finally, C. A. Anderson, principal of Mid-Pacific Institute, concluded [R. 558]:

> "'In my opinion, we need not concern ourselves about the possible negative influence of language schools in our endeavor to help boys and girls to become good citizens.'"

And following the above and similar hearings, a Joint Committee of the United States Senate and House of Representatives reported [R. 552]:

> "'Much is made of the foreign-language schools and press, but it should be realized that these agencies serve a real purpose in the adjustment of an immigrant group to new conditions.'"

Moreover, the alleged subversiveness of Japanese language schools was urged upon this Court by Hawaii's

Attorney General in the *Farrington* case;[14] and was, in effect, by this Court rejected. The Record in the *Farrington* case discloses assertions that Japanese children were taught loyalty to the Japanese Government and to the Japanese Emperor, and antagonism toward America and things American.[15]

Yet this Court said in the *Farrington* case (at p. 298), "The record discloses no adequate reason" for the legislation.

Indeed, the Attorney General in the instant case conceded below that the loyalty of those who had attended language schools is unquestioned [R. 349], and that the graduates of the public schools of Hawaii in their contribution to the war have been equally good citizens no matter their race and no matter their attendance in any language school [R. 271].

Moreover, the language schools in Hawaii remained closed by military order from December 1941 until March 1943 [R. 429]. The present statute was enacted the following month in May, 1943.

In 1943, as throughout the war, Hawaii was the scene of the pressure of a vigorous "Speak English" campaign [R. 304]. Dr. Loper, Superintendent of Public Instruc-

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[14]No. 465, Oct. Term, 1925.

[15]See particularly Bulletin filed in the *Farrington* case with this Court, published by the Bureau of Education, Department of Interior, and note reliance upon this publication by the Attorney General in his brief (at p. 134) in the *Farrington* case. The Bureau of Education survey is entitled, "Bulletin, 1920, No. 16, Department of Interior, Bureau of Education, Government Printing Office, 1920. The Bulletin is on file with the Clerk of this Court in the *Farrington* case.

tion, more aptly called it a "Speak American" campaign [R. 266].[16]

Moreover, when the instant statute was adopted, the Japanese people of Hawaii were 32.5 per cent of the total population [R. 439]. Since we were at war with Japan, neither the Territorial Senate or House had a single representative of Japanese descent. In addition, and, of course, the older Japanese, having been born in Japan, were disenfranchised from voting by our naturalization laws.

Hence, it appears that the statute was aimed at, and applies only, to racial minority groups;[17] and was adopted

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[16]The effect of the campaign was such that the Department of Public Instruction of Hawaii adopted a policy of not promoting a child that did not make a passing grade in English, even if he made excellent marks in everything else. [R. 266.] The following colloquy between Judge Denman and Dr. Loper is noteworthy:

> "So that during the pressure of the war and the attendant psychological changes in the community you went from a pedagogical to a martial administration of the study of the English language, isn't that manifest?
>
> The Witness: I guess so."

Dr. Loper conceded, however, that English was not the sole goal of education. [R. 554, 555.]

[17]The fact that the statute, on its face, does not mention Japanese is neither conclusive, nor necessarily persuasive. California's legislation against Japanese did not mention them by name, but this Court concluded that California's anti-Japanese fishing legislation was aimed against the Japanese. *Takahashi v. Fish and Game Commission, supra.* See also concurring opinions in *Oyama v. California, supra.*

Again, the statutes in the *Meyer, Bartels,* and companion cases, with the exception of the *Bohning* and *Pohl* cases, did not mention German by name; but this Court so found.

Indeed, the Attorney General conceded below that if the instant statute had specifically designated Oriental languages it would be unconstitutional, in the face of the decisions of this Court. [R. 158, 159.]

at a time when these groups were least able to protect their liberties in the legislative halls of Hawaii.[18]

This Court has declared that the right of the parents over its child's education—including the right to acquire a knowledge of a foreign language, to be a "fundamental right." (*Farrington* case at p. 299.)

The trial court below unanimously took the view that "the parent's right to have the offspring taught a foreign language is one of the fundamental rights guaranteed by the due process clause of the Fifth and Fourteenth Amendments" [R. 80].

And in the *Meyer* case (at p. 403) this Court expressly ruled that legislative action may not abridge that fundamental right, except when justified by an "emergency."[19] Hence, this Court is now requested to give the instant statute that judicial scrutiny required of "legislation restricting the civil liberty of racial . . . minorities." (Chief Justice Stone, dissenting, in *Minersville District v. Gobitis*, 310 U. S. 586, 607, citing the *Meyer* and *Farrington* cases.)[20]

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[18] *Cf.* the adoption of legislation against Alien Japanese fishermen in California in 1943, when the Japanese were evacuated from California and hence unable to protect themselves against California's legislative encroachments upon their civil liberties, noted by this Court in *Takahashi v. Fish and Game Commission.*

[19] "No emergency has arisen which renders knowledge by a child of some language other than the English so clearly harmful as to justify its inhibition, with the consequent infringement of rights long fully enjoyed." (*Meyer* case at p. 403.)

[20] *Cf. United States v. Carolene Products*, 304 U. S. 144, 153, Footnote 4, again citing the *Meyer* and *Farrington* cases as examples of legislation aimed at national minorities.

That judicial scrutiny calls for this Court to "weigh the circumstances" and "appraise the substantiality of the reasons advanced" in support of the challenged statute.

Schneider v. The State, 308 U. S. 147, 161, 162;
Thornhill v. Alabama, 310 U. S. 88, 96.

B.

The Reasons Advanced in Support of the Statute Are Unsubstantial.

1. This Court Has Adjudged to Be Unsubstantial Substantially Similar Reasons Proferred in Support of Substantially Similar Statutes.

Briefly stated, the reasons advanced in support of the statute are that, in general, and particularly in Hawaii, the teaching of foreign languages, and particularly of Oriental languages, contemporaneously, to a child of immature years has the two-fold effect on the child of:

(a) Retarding his progress in properly understanding English, and hence in all studies in the public schools (since all these studies are in English) and, inaddition,

(b) Such simultaneous studies cause "serious emotional disturbances, conflicts, and maladjustments."

[Section 1871 of the Statute, Appellants' Brief, Appendix I, p. 89; discussed at length in Appellants' Brief at p. 50 *et seq.*]

It is urged, accordingly, that the instant statute differs from those held unconstitutional by this Court in the *Farrington* and *Meyer* cases; for, it is said, this statute has for its objective the protection of the children, an objective not involved in the *Farrington* and *Meyer* cases.

An examination of the decisions of this Court in the *Farrington* and *Meyer* cases, and of the records in those cases upon which those decisions were based, demonstrate the contrary.

3. Health of the Child.

Thus, in the *Farrington* case, the Attorney General of Hawaii, in his brief, stressed the serious effect of attendance in Japanese language schools, upon the *health* of the child. He urged that: The Japanese language schools ran before and after school hours so that the Japanese child's school day was practically from dawn to dusk (Brief of Territory of Hawaii in *Farrington* case, No. 465, October Term, 1925, p. 114);[21] that due to fatigue, effective instruction of the child in the public schools was seriously hampered (Brief, pp. 114, 127-130). The Attorney General relied heavily upon the findings made in a special study under the auspices of the United States Commissioner of Education, on file with the Clerk of this Court in the *Farrington* case, claiming that children suffered from mental and physical fatigue (p. 128).

Yet, this Court, as already observed, ruled that "the record discloses no adequate reason" for the legislation (*Farrington* case at p. 298).

Substantially similar claims were made to, and rejected by, this Court in the *Meyer* case. There this Court observed (at p. 403):

> "It is well known that proficiency in a foreign language seldom comes to one not instructed at an early

[21] It is conceded that the Chinese language schools are open only after public school hours, the teaching lasting one hour and a quarter. [R. 435.]

age and experience shows that this is not injurious to the *health*, morals, or understanding of the ordinary child." (Italics supplied.)

b. "RETARDATION."

And with respect to the claim in the instant case of "retardation" as the alleged justification for the present statute, that very claim, too, was urged upon this Court in the *Farrington* case.

Thus, again, the Attorney General in his brief in the *Farrington* case (p. 114) represented that the studies in the Japanese language schools "seriously hampered effective instruction of the child in the public schools"; and particularly that instruction in the Japanese language hampered instruction in the English language. Again, he relied on the survey of the United States Commissioner of Education that (p. 128) "children cannot master two languages at once" and that (at p. 130) "the Japanese language schools have a very bad effect on the English of children."

Again, this Court must have rejected these claims, too, when it said: "The record discloses no adequate reason" for the legislation (at p. 298).

2. Responsible Educators of Hawaii Have Uniformly Repudiated the Reasons Advanced as Unsubstantial.

Thus, in 1935, as heretofore discussed in part, the Superintendent of Public Instruction of the public schools of Hawaii, Dr. R. E. Long, appeared before a Congressional Committee to testify pertaining to the language schools in Hawaii. For himself he represented that the views which he expressed reflected the attitude of the 2,723 public school teachers in the Territory [R. 554]. In

submitting statements of educators of Hawaii, he represented that the statements were "by representative educators" [R. 555].

The first statement was by A. L. Dean, former President of the University of Hawaii, who stated: "That education in the public schools is not interfered with" by the foreign language schools [R. 556].

Dr. W. Harold Loper, Supervising Principal of the Honolulu schools, observed, in his statement, "The popular opinion of a few years ago that the work of the language schools interferes with the teaching of English in the public schools is probably false" [R. 556]. He declared the study by Professor Symonds to be the only objective study of this problem which he had seen, and quoted the following from the Symonds' study:

> "(a) That the influence of the home and the playground is about four times as great as that of the Chinese language schools in causing retardation in the English language.
>
> "(b) That for better English we should let the foreign-language schools alone and turn our attention to the home, the playground, and the kind of individuals are reborn.
>
> "(c) That correct speech has a worse enemy in the 'pidgin English' of the home than in the Chinese language school.
>
> "I should expect to find the same results in connection with the Japanese language schools" [R. 556].

Dr. William H. George, Dean of the College of Arts and Science of the University of Hawaii, observed:

> "Every child should know two languages, the language of its nativity and another. It would be a distinct cultural loss if our young American citizens of

> Japanese ancestry were to neglect the language of their fathers. So valuable is this training that a goodly number of occidental children have taken advantage of it. . . . I wish to go on record, therefore, as favoring the Japanese language schools in Hawaii" [R. 556].

Again, in 1937, in his appearance before a Joint Committee on Hawaii of the Congress of the United States,[22] Dr. Long again relied upon the Symonds' study [R. 547], stating:

> "He found, so far as the language school is concerned, that there was apparently no effect on the English problem in the public schools."

And further:

> "I don't want to go on record as saying that the study of a second or third language is detrimental to good citizenship. It is not a question in the study of French. I am not familiar with any body of people who question it" [R. 547].

3. The Testimony Adduced at the Trial Demonstrates That the Reasons Advanced in Support of the Statute Are Unsubstantial.

a. With respect to the alleged effect of language schools on the health of the child—the claim of "serious emotional disturbances, conflicts and maladjustments", [Declaration of Legislative Findings, Sec. 1871, Appendix I, B, p. 99], the witnesses produced by the Territory who asserted this claim conceded:

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[22]Hearings before the Joint Committee on Hawaii, Congress of the United States, 75th Congress, 2nd Session, pursuant to S. Con. Res. 18. [Plaintiffs' Exhibit F, R. 546.]

1. That no study of the emotional effect upon the child of attendance at a foreign language school had been made in Hawaii;[23] that no study had been made by physicians, or others, of alleged neuroses arising from language difficulties.[24]

2. That the facility of the child to talk to and to communicate with its parents in the language of the parents was conducive to emotional stability;[25] and thus offset any claimed emotional instability, asserted to result from the study of such "foreign" language.

Indeed, it is the unchallenged testimony of Hawaii's leading educators before the House Committee that language schools have served as a socially and hence emotionally *stabilizing* agency.

Thus, E. F. Sayers, Director of the School of Elementary Education, University of Hawaii, who had served as

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[23]Dr. Bruce White, Professor of Education at the University of Hawaii [R. 313].

[24]Testimony of Dr. Richard Myer [R. 330]. Dr. Medora Smith admitted also that no study had been made of alleged neuroses; and that she knew of no example of a serious neurosis as the result of foreign language school attendance [R. 418].

[25]Thus, F. Deal Crocker [R. 291, 305] admitted: "It might help the child to actually understand its parents' culture a little better." Again, Dr. Bruce White acknowledged that there is a decided educational and psychological advantage in the ability of the child to converse with his parents in their own language; and Dr. J. Robert Jacobson [R. 370, 383] recognized the psychological value of an adequate language communication between parent and child. Again, Dr. Romanzo Adams, Professor of Sociology at the University of Hawaii, in an article entitled, "Functioning of the Language Schools in Hawaii," wrote [R. 220]: "The principal function of the language schools of Hawaii is to reinforce the influence of parents, to increase their prestige in the eyes of the children."

Moreover, it is apparent that in being able to communicate with their parents in the language of their parents the children "gain some appreciation of Japanese culture." See statement of Dr. A. L. Dean [R. 556, 261].

a member of a "Committee Known as the Governor's Committee on Foreign Language Schools," stated:

> "I changed my mind in the course of time, so that by 1926 I had come to look upon these schools as constructive social agencies in the Territory. Briefly, I came to see them as stabilizing factors because of the service they rendered youth that were in danger of losing the social benefits of home and family influence before they had sufficiently accepted the customs and institutions of the American community in which they were growing up" [R. 558].

And again, Dr. A. L. Dean, formerly President of the University of Hawaii, stated before the same House Committee:

> "Furthermore, the children are in a difficult transition stage from the mores of their parents to those of America. The maintenance of family control of adolescents and the giving to them of guidance is made abnormally difficult. Although I do not like the idea of the language schools, I am not at all sure that we would not find our problems of social adjustment aggravated if we did not have them" [R. 556].

In any event, one fact is certain—and that is that in the entire field of bilingualism, in general, and the emotional effects of bilingualism upon children, is, so far as the educational experts are concerned, a field is speculation or, at the most, one of exploration [R. 315].[26]

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[26]Dr. Bruce White, Professor of Education at the University of Hawaii and Acting Dean of the Teachers' College, a witness for the Territory, preferred the phrase "exploration," to "speculation" [R. 315].

b. With respect to the alleged "retardation" of children in Hawaii in the knowledge of English and progress through the public schools:

The parties are agreed that there is retardation in the knowledge of English generally in the Hawaiian Islands, and that is due primarily to the prevalent use of pidgin English [R. 254-258, 259, 269, 270, 353, 356, 357]; (*cf.* also the Symonds' study as accepted by Dr. Loper [R. 556]).

At the trial, some of Hawaii's educators testified that the foreign language schools in Hawaii are also a factor in that retardation. It is to be noted that the leading educators of Hawaii—at least in official positions—admitted on cross-examination that their present views were at variance with those expressed by them before at the Congressional Committee hearings heretofore discussed. These Hawaiian educators are: W. Harold Loper, Superintendent of Public Instruction [R. 236]; O. W. Robinson, Deputy Superintendent of Public Schools [R. 391]; and Orin E. Long, former Deputy Superintendent of Public Instruction and Acting Governor of the Territory [R. 343].[27]

In any event, the witnesses for the Territory admitted that the only scientific or *quasi*-scientific studies made with respect to the effect of foreign language schools on English in the Islands were at variance with the views they expressed at the time of the trial;[28] that these studies con-

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[27] Their testimony or statements submitted to committees of the Congress appear in the Record, as follows: Loper, 556; Robinson, 551; Long, 554 and also 547.

[28] The studies are that of Professor Symonds heretofore discussed, as well as one by Henry B. Schwartz, "A Study of the Effect of Attendance at Language Schools Upon Success in McKinley High School," Hawaii Educational Rev. 30 (Oct. 1925); the latter study is discussed at R. 212.

clude that there was *no* significant relationship between the language schools and retardation.

Moreover, witnesses for the Territory relied heavily upon a community survey of education in Hawaii [Deft. Ex. 1, R. 559, discussed in App. Br. at p. 60].

But the survey began with the admission:

> "Hawaii's School System Cannot Be Patterned Exactly Upon Any Mainland System
>
> "Hawaii should never make the mistake of trying to fit her unique youth to some mainland pattern of education. Her public school system should never become just another school system. Mainland patterns were none of them fashioned for the children of parents who represent seven cultures and have come to live as neighbors and friends on seven isolated islands, in the middle of a great ocean. These children have unique abilities, they present unique problems, and furnish unique delights" [R. 559].

The survey notes that there are:

> "Conditions Which Make Comparison With Mainland Results Less Reliable Than They Would Otherwise Be
>
> "There are factors in the situation which render the comparison with the mainland averages less trustworthy than it would ordinarily be, but it is possible to make at least a rough comparison. The tests used were all standardized on the mainland and in no case is it probable that the standards were based on results secured from testing such a large proportion of rural children or as many children of foreign-born parents as in Hawaii's schools" [R. 560-561].

It is conceded that the tests were all given in English; and that these tests, if given in certain parts of New York

City or in any other immigrant community, would similarly show "retardation."

And Hawaiian educators have on many occasions compared the "English problem" in Hawaii, as well as the role of Hawaiian language schools, with the similar "English problem" on the mainland and the role on the mainland of foreign language schools in immigrant communities. Thus, Dr. Long, in his Congressional Committee testimony [Pltf. Ex. F, R. 549, 356], observed: "Now the quality of the English spoken (in Hawaii) varies greatly, just as it does in the New York East Side district, and certain sections of Boston" [R. 549]; and specifically with respect to the foreign language schools in Hawaii, Dr. Long stated:

> "From the standpoint of their possible effect on citizenship, they are likely of no greater significance than the language schools of the mainland that were usually established when considerable numbers of any cultural group settled in the Middle Western States, particularly the German and Scandinavian groups. The history of all such schools has been that they are gradually eliminated. The second and third generations lose interest in them. There is no reason to believe that the local groups will prove to be exceptions in this respect" [R. 555].

Similarly, Harvey L. Freeland, Director of Vocational Education in the Islands, considered the problems attending the Hawaiian language schools as comparable to those involving parochial schools on the mainland, stating:

> "For 10 years I was a teacher in the Minneapolis school system, where many Scandinavian parochial schools existed. For an equal period I was connected with the State Boards for Vocational Education of

Iowa and Nebraska, where I had considerable opportunity for observe the parochial schools in those States. From 3 years of experience in the Territory, I believe that the oriental-language schools here have the same general objectives as the parochial schools in the three States named" [R. 558].

Again, Dr. Loper agreed that with respect to the tests used in the Hawaiian schools an immigrant Jewish boy in New York City or a German boy in Nebraska whose parents spoke German and who lived in a family where German was spoken would fare the same as a Japanese or Chinese boy in the tests given in the Hawaiian schools.

Dr. Robinson admitted that the pattern on the Islands [R. 396] is similar to the communities on the mainland where the immigrant population was once large and that the problem will generally take care of itself through the lapse of time.

Nor does the claim that some educators believe it to be desirable to postpone a study of a second or "foreign" language until after the child has acquired a familiarity with the first have any application to the Appellees, or to the situation in Hawaii.

The Chinese parents who desire to teach, or to have taught, their children in the Chinese language do not seek to educate their children in a *foreign* language; they seek to educate them in their mutual *mother* tongue.

Moreover, the Chinese parents desire not only to have their children taught the Chinese language, but through such teaching to have their children acquire a familiarity with Chinese culture, that they and their children may thus have a larger and deeper community of home interest,

during the period of the childhood and adolescence of their children.

Hence, to argue, as do the Appellants, that the Chinese children will, according to some educators, acquire a greater facility in speaking Chinese in later years if they are required by law to postpone a learning of that language during their early years, has no application to the desires and needs of both the Chinese parents and their children involved in the instant case.[29]

Moreover, in appraising the substantiality of the reasons advanced in support of the statute, the following conceded advantages should be borne in mind:

That familiarity with the Chinese language, particularly in Hawaii, result in (1) a community of interests between the child and the parent—that it "brings harmony in the family" [R. 152, 186]; (2) that knowledge of Chinese is especially necessary to the Chinese business and professional man to engage in his business or profession [R. 169]; (3) that the knowledge of Chinese was particularly useful during the last war [R. 203].

In the face of the foregoing conceded advantages, the asserted disadvantages must be examined in the light of

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[29]The importance of children of Chinese parents in Hawaii in acquiring familiarity with the Chinese language during the childhood is the more important in Hawaii, because of the large number of Hawaiian school children, coming from poor families, who are required to, and do, leave school at the age of fifteen or sixteen to work in the fields [R. 288, 289]. *Cf.* the observation of Judge William Denman, below:

> "Since the testimony is that a very large number of Hawaiian children of fifteen seek their own living and support at that age, it is apparent that as to most of them their parents must have taught them a foreign language before that time if one is to be acquired" [R. 80].

the apparent and obvious—that the Appellants' claims of asserted disadvantages are unsupported by any authentic body of scientific (in the field of education) study or opinion. The entire field of bilingualism is still one of exploration—if not one of speculation [R. 315]. As one expert in the field put it, "The scientific study of bilingualism is merely at its beginning."[30]

Accordingly, even if a Territorial legislature, as alleged *parens patriae*, had the broad authority claimed for it (B. 52) to overrule the parent in the education of his child, in private education supplemental to public education and after school hours,[31] it may not do so on grounds as unsupported by acknowledged scientific findings or uniform educational experience as is the instant statute.

Certainly, no educational experience in Hawaii or elsewhere, nor recognized opinion by educational experts in Hawaii or elsewhere, is of such general acceptability as to override the observation of this Court in the *Meyer* case

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[30]Dr. Seth Arsenian in "Private Language School and Mental Development" [R. 455]:

And with respect to language schools in particular, another expert [R. 217] stated: "On this matter of the influence of the language schools a tremendous deal has been said, but very little is known as (that is) scientific."

[31]This Court has said, to the contrary: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters*, 513, 535.

In accord is the observation of Justice Harlan in *Berea v. Kentucky*, 211 U. S. 45, 67, quoted with approval by the court below [R. 81] and by the Ninth Circuit Court of Appeals in the *Farrington* case, 11 F. 2d 710, 713:

"The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its use may not be forbidden or interfered with by government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperil the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive

(at p. 403) that "It is well known that proficiency in a foreign language seldom comes to one not instructed in an early age"—a view concurred in by Justice Holmes in *Bartels v. Iowa* (at p. 412): "Youth is the time when familiarity with a language is established."

In similar circumstances, this Court would not permit a difference of opinion among educators to determine this Court's judgment as to whether a particular practice in the schools of the United States offended the Constitution. It would not permit itself to make a modest estimate of its "competence in such specialties as public education," to "withhold the judgment that history authenticates as the function of this Court when liberty is infringed." (*Board of Education v. Barnette*, 319 U. S. 624, 640.)

In the instant case, as in the *Barnette* case (at p. 646), the reasons proferred in defense of the statute, are not "sufficiently definite and tangible to justify the invasion" of the freedom of both the parent and the child to acquire a knowledge of a language and culture of their own choosing, in a manner selected by them, and not coerced upon them by the state, against their will and consent.

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it, is a substantial right of property, especially, where the services are rendered for compensation. But, even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States. This court has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces "the right of the citizen to be free in the enjoyment of all his faculties," and "to be free to use them in all lawful ways." . . . If pupils, of whatever race—certainly, if they be citizens—choose with the consent of their parents or voluntarily to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether federal or state, can legally forbid their coming together, or being together temporarily for such innocent purpose." [R. 81]

C.

The Statute Is Unconstitutional in That It Is Too Broad and Sweeping.

The instant statute compared with those held invalid in the *Farrington, Meyer* and *Bartels* cases, discloses:

1. Section 2.

Section 2 of the Statute provides:

> "Definitions. As used in this chapter: 'School' means any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice" [R. 79].

Of that Section, the Court below observed:

> "The striking provision of the Act is the extraordinary definition of what constitutes a school in which a foreign language is taught" [R. 79].

First, under this provision, the parochial schools in Hawaii are clearly included.[32] The Attorney General conceded that the parochial schools are encompassed, the court below observing:

> "There are many Hawaiian Catholic parochial schools with complete educational courses, attendance in which is an equivalent to that of the regular public schools. The defendants state the Act interdicts the

[32] A comparatively large number of children in Hawaii attend parochial schools. The figures for the island of Oahu are 7,198; those attending the public schools on the island number 47,191 [Pltf. Ex. B, R. 506].

teaching of even Latin or Greek to the children of the age and scholastic standing it seeks to affect, and "we agree" [R. 85].[33]

Then, in Hawaii, there is express statutory provision for the employment of private tutors as legal substitutes for the required attendance at the public schools [R. 145]; (Sec. 1830, Hawaiian Statutes, 1945).

It was conceded that such private tutors fall within the definition of "school" in Section 2 [R. 145].

The court below properly observed that the Statute

> "certainly would apply to a religious Chinese descended mother having an educated cousin teach two of her children in her home the truths of Confucius, even orally, explaining the words of that spiritual guide in the language in which they are spoken and are recorded" [R. 80].

And while the Attorney General refused to concede below that a parent is included in Section 2 [R. 145], as is a private tutor, it is manifest that the clear and unambiguous language in Section 2 does include a parent: a parent is a person, too.[34] The Territorial legislature, in adopting the unusual definition in Section 2, must have intended a broad and sweeping inclusion within its terms, for it went out of its way in the 1943 Statute, to expressly

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[33]The Statute would, of course, apply to altar boys, taught in the parochial schools. It was so conceded [R. 401].

[34]It was conceded below "that parents are the best tutors sometimes" [R. 145].

Moreover, with respect to the alleged "evil" against which the Statute is aimed, it would seem that "emotional disturbances" would be the same, if not greater, whether the "foreign" language is taught by parents as by a private tutor at home or in an organized foreign language school.

enact a broad definition of "school," not contained in the 1923 Statute.

It is to be noted, additionally, that in the earlier statute, Sabbath schools were expressly excluded; not so in the instant statute.

Noteworthy, too, is the fact that in the Nebraska statute held invalid in *Nebraska District v. McKelvie* (No. 440, October Term 1922, 262 U. S. 404, 410, Footnote 3), Section 3 of that Statute expressly exempted from its provisions the parent "teaching his own children in his own home any foreign language."

2. Section 3.

In one further, and highly significant respect, is the instant statute more sweeping in its ambit than the former statute. Thus, the present Act unqualifiedly bars the teaching of a foreign language to children under the fourth grade; and permits such teaching thereafter, and through the eighth grade, only after the child's passing certain tests. The 1923 Act contented itself with a prohibition limited only to the first and second grades (*Farrington* case at p. 295).

Accordingly, while under the former statute children only up to approximately eight years of age were encompassed by it, under the instant statute, children up to approximately ten years of age are absolutely barred in the study of a foreign language; and children up to approximately fourteen years of age are "regulated" in their right to do so.

In one other respect is Section 3 vague and indefinite. "Foreign" language is not defined (either in Section 3 or anywhere else in the Statute). In this respect, too, it

differs from the 1923 Act. There, foreign language school was expressly defined as a school "conducted in any language other than English or Hawaiian." (The text of the statute appears in the *Farrington* case at p. 291.)

Similarly, in all the other statutes before this Court in the *Meyer, Bartels* and companion case of *Nebraska District v. McKelvie*, the statutes on their face disclosed that the languages aimed at were languages other than English. Not so the present statute.

What is a "foreign" language? Particularly in Hawaii, what is a foreign language? Does it include Hawaiian? The Attorney General so asserted below [R. 160]. Yet the Hawaiian language seems to have recognition as an official or *quasi*-official language in Hawaii by Section 826 of the Hawaiian Statutes which require the teaching of Hawaiian in normal and high schools and in certain public schools. Moreover, it is obvious that Hawaiian, as distinguished from English, is the original and hence domestic language in the Hawaiian Islands. Moreover, in the absence of a clear definition of "foreign" language in the Statute, may Chinese be said to be a "foreign" language when that language is used in the home by the Chinese parents and their children. Is Chinese language used under such circumstances not essentially a "domestic" or mother-tongue language rather than a "foreign" language?

Hence, the instant statute is the most sweeping of any of the foreign language statutes heretofore before this Court, in its coverage of the persons who may teach a foreign language, the children who are subject to it, and the indefiniteness as to what constitutes a foreign language.

The Statute, accordingly, in its vital provisions, is not one "narrowly drawn to cover the precise situation giving rise to the danger" (*Thornhill v. Alabama*, 310 U. S. 88, 105), but, on the contrary, "sweeps within its ambit other activities which in ordinary circumstances constitute an exercise" of a fundamental right (*Thornhill* case at p. 97).

And the failure of the Statute to define "foreign language," results in a fatal failure to define conduct with reasonable certainty. (*Cf., Winters v. New York*, 333 U. S. 507.) There must be reasonable standards of guilt. "Men of common intelligence can not be required to guess at the meaning of the enactment." (At p. 260, 92 L. Ed. (Adv. Op.).)

D.

The Statute Violates Rights Under the First Amendment.

The right of Appellee Leong Nget Cho, the teacher of the Chinese language herein, would seem to constitute the exercise of freedom of speech on his part guaranteed by the First Amendment.

That Amendment has been construed by this Court to accord a (non-Chinese) labor union leader the right to practice his profession and speak in the course of it. (*Thomas v. Collins*, 323 U. S. 516.) The First Amendment equally protects a Chinese teacher.

Furthermore, the counterpart of the freedom to teach on the part of the teacher, is the freedom to learn, on the part of the child and the freedom of the parent to have his child so learn.

If, as we urge, freedom to teach is a phase of freedom of speech, freedom to listen is its constitutional counter-

part. The First Amendment, assuring freedom to speak, protects also freedom to listen.

Moreover, the Chinese parents[35] and their children subjected to the instant statute are, in effect, not enjoined alone in the teaching and learning respectively of the Chinese language; they are equally restrained in the ideas which may be conveyed in the course of the study of the Chinese language.

And this Court has expressly decided that the *use* of Chinese is a basic civil right. (*Yu Cong Eng v. Trinidad*, 271 U. S. 500.)

The Chinese language schools, moreover, teach not only Chinese as a language; in teaching the language of Chinese, there is also taught philosophy of life and the ethics of Confucius[36] and the Manchus[37] [R. 186]. And clearly

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[35]The dismissal by the trial court of the complaint as to the plaintiff parents, Wah Chan Tom and Wilfred Chong [R. 113], is of no consequence so far as the rights of parents under the statute are concerned. No parent was a party in either the *Farrington*, *Meyer* or *Pierce* cases. Yet this Court held those statutes invalid because violating, on their face, the rights of parents. This holding was pursuant to the policy of this Court, articulated more expressly in more recent cases, that statutes affecting fundamental civil liberties are to be judged on their face; and rejected if possibilities of abuse lurk within them.

Cf.

Thomas v. Collins, 323 U. S. 516;
Thornhill v. Alabama, 310 U. S. 88, 97;
Schneider v. State, 308 U. S. 147, 162;
Hague v. C. I. O., 307 U. S. 496;
Lovell v. Griffin, 303 U. S. 444, 451;
Herndon v. Lowry, 301 U. S. 242, 261;
Stromberg v. California, 283 U. S. 359, 369.

[36]*Cf.* Judge Denman's observation that the statute would enjoin the teaching of the truths of Confucius in the Chinese language [R. 80].

[37]According to Dr. William H. George, Dean of the College of Arts and Sciences of the University of Hawaii, the Japanese language schools were "prompted by cultural and religious motives" [R. 556].

the Statute, in applying to parochial schools and the study of Latin as a foreign language in such schools, impinges upon the exercise of both freedom of expression and freedom of religion.

E.

The Statute Violates the Clear and Present Danger Rule.

The appellants concede that the clear and present danger rule applies to rights rooted in the First Amendment. (B. 76). Rights under the First Amendment are in issue herein. Hence, the clear and present danger rule applies.

Moreover, even if rights not strictly bottomed on the First Amendment were alone involved here, still the clear and present danger rule should be applied by this Court. For, at the minimum, important fundamental rights are in this case (*Farrington* case at p. 299). And this Court has already pointed the way toward the application of the "clear and present danger rule" to such statutes, by suggesting, if not definitively ruling, that such a Statute must find support in some "emergency" (in the *Meyer* case at p. 403). The phrase, "emergency," is part of a concept of the "clear and present" danger rule.

Clearly, no emergency exists in Hawaii from either organized foreign language schools or the teaching of foreign languages as broadly proscribed by the instant Statute, warranting the invasion provided by the Statute upon the rights of Chinese parents to educate their children in the language and culture of their mutual choice.

Whatever the "evil" from the foreign language schools in Hawaii, the educators of Hawaii and the witnesses for the Territory have uniformly conceded that that evil will be cured by lapse of time.

Supporting this conclusion is the Report of a Joint Committee of the United States Senate and House[38] reading:

> "It should be remembered that the privilege of naturalization is denied the alien-born Japanese except in certain special cases, or their reaction to the American environment of Hawaii might have more nearly paralleled that of European immigrant. Undoubtedly many would gladly become citizens of the United States, if permitted to do so. In any event, the alien group will pass off the stage within a short time, since they are all reaching old age almost simultaneously. As it is, the younger generation show the same attitude toward America that the first generation American-born European origin do; an appreciation of the material benefits received; a high con-

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[38]And with respect to one of the very Appellees herein, the Mun Lun Chinese School, Oren E. Long, Superintendent of Public Instruction and one of the key witnesses for the Territory, in the instant case, on the Twenty-fifth Anniversary of the Association issued the statement:

> "For 25 years it has played an important part in the development of Hawaii. As a result of its program many thousands of young citizens have become familiar with the language and culture of China, one of the greatest civilizations of history. It has also contributed to the spirit of understanding and good will which exists in Hawaii, to the social and economic efficiency of our young people and to their personal happiness and well being.
>
> "Because of our kindred interest in the youth of Hawaii, I wish on behalf of the public schools to congratulate the Mun Lun Chinese School on the observance of its 25th anniversary and to express the hope that it will continue for many years to serve the best interests of this community" [R. 402].

The Governor of the Islands, Joseph B. Poindexter, said of Hawaii's private schools, including the Mun Lun Chinese School as one of its private schools:

> "Hawaii is justly proud of its public and private schools. They determine the type of community life which we enjoy, and more than any other influence excepting that of the home they give us standards of citizenship and a law basis for social progress. Among these educational institutions the Mun Lun Chinese Schools has been outstanding" [R. 402].

ception of the freedom enjoyed; and an earnest endeavor to comply with the standards of the new culture.

"On the basis of behavior the American citizens of Japanese ancestry leave little to criticize and much to praise. As an orderly, law-abiding group their record is unexcelled. Their thrift and industry and willingness to cooperate with other groups are all well-marked traits. The evidence of schools and civic organizations, of church and political activities, all point to a desire on their part to share to the full the community responsibilities and to do so as fellow Americans, expressing a common loyalty to American ideals and institutions. Much is made of the foreign-language schools and press, but it should be realized that these agencies serve a real purpose in the adjustment of an immigrant group to new conditions. Many European immigrants have turned to the same means for establishing contact between the two generations. When these transitory vehicles have served their purpose they cease to exist, and there is no occasion to doubt that Hawaii will follow the same pattern already familiar to us on the mainland. The Americanization of the Japanese in Hawaii has perhaps made greater progress than it has with many immigrant groups of longer residence in America living in mainland communities. *Time will automatically solve many of the problems that seem to loom up as insurmountable today.* (Italics supplied.) The people of Hawaii are to be commended for the manner in which they have undertaken the task of maintaining the democratic principles of America and for having extended them to all its citizens. They are to be congratulated for the degree of success shown by all races in absorbing the spirit of American institutions. In this effort those of Japanese ancestry have taken their full share" [R. 551-552].

Accordingly, there is no justification for serious invasion of the liberties of the Chinese population of Hawaii to cope with an "evil" which time will cure.

Additionally, no claim has been made in behalf of the Territory or by any of its witnesses that the alleged retardation of the children of Hawaii (whether due to language schools or other causes) has or does affect their citizenship in, or qualifications for, citizenship in either Hawaii or the United States.

Thus, Oren E. Long, in his testimony before the Congressional Committee heretofore averred to [R. 554], asked himself the following question: "Do the citizens of Hawaii have a reasonable understanding of American institutions, and are they loyal to those institutions?" and thus answered it:

> "On the basis of my rather intimate understanding of the pupils in the schools, my contacts with the patrons of the schools in the parent-teacher association and my general knowledge of the larger community, I am convinced that . . . (this question) must be answered in the affirmative."

It would seem clear that, accordingly, the Statute is not directed at an "evil" as serious as that claimed in the *Farrington, Meyer* and companion cases, in the *Farrington* case the evil claimed was the teaching of disloyalty to the United States and of antagonism to America and things American. (Brief of Hawaii's Attorney General in the *Farrington* case at p. 134.)

In short, the reasons advanced for the legislation in the former language school cases before this Court was the safety of the state itself. To cope with so serious an evil, the state clearly might be warranted in taking action to protect itself action more stringent than in coping with

the claimed "evil" asserted herein—alleged "emotional conflict" and "retardation"—allegations and claims based on speculation and unsupported by demonstrable fact or accredited and reasonably uniform opinion by experts in the field of education.

Yet this Court found the reasons advanced in the former language schools to be constitutionally wanting; the reasons advanced for the present Statute are the more so.

F.

Section Four of the Statute Is Invalid as an Arbitrary and Unreasonable Exercise of the Police Power.

The Statute provides in section four that teachers must be certified by a board of examiners to be "reasonably well versed in the usage and idiom of both the English language and the foreign language to be taught by such teacher." This same type of provision was found to be unconstitutional in the *Farrington* case. There, the Act provided, amongst other things, that: "Before obtaining a permit to teach, the applicant must satisfy a territorial officer that he . . . knows how to read, write, and speak the English language." (*Farrington v. Tokushige*, 11 F. 2d 710, 714.)

Coupled with the other requirements and the general purpose of the Act, the Circuit Court, whose decision was affirmed on appeal, there concluded that the pupils must take a "course in Americanism—a course not required by any other class of citizens or students." The Court went on to say: "We feel quite safe in saying that, if such a system of regulations were enforced by one of our American commonwealths against an American college in which foreign languages are taught, it would shock the conscience of mankind" (p. 714).

Appellants attempt to distinguish the present statute on the grounds that under this statute the teacher must be well versed in not only English, but in his own language as well; that the regulatory features are somewhat different; and that the declared purpose of the statute is to provide for the welfare of the children and not general "Americanization." This last contention has been fully discussed above. It is sufficient here to note that the ultimate result intended of both statutes is the same, whatever the express terms of the more immediate objective of the present Statute.

As to the first contention, appellee school teacher, representing others similarly situated, must comply with all portions of the Act in order to teach school. The inclusion of the provision regarding his knowledge of the foreign language does not serve to mitigate the effect of his being required to also know the English language, which he alleges he does not know and pertaining to which he does not desire to submit to an examination. There is no legislative finding with respect to proficiency in the foreign language to support the necessity for this provision. The Act is designed to promote good English, not proficiency in the "foreign language." This provision then has no relationship to the purpose of the Statute. Were these schools connected with the public schools, or a substitution for public schools under the compulsory school system, then a requirement that the teachers have a degree of expertness in the fields taught would be reasonable, but that is not the case here. Here the claim is not that the foreign language is not well taught, but merely that its teaching interferes with the teaching in the public schools. This "balancing" requirement then can have no effect on the requirement of expertness in the English language found to be unconstitutional in the *Farrington* case.

The requirement with respect to expertness in the English language, whatever the purpose of the Statute, can no more be supported than in the *Farrington* case. There is no showing that a knowledge of English has any relationship to the ability to teach a foreign language. This teacher, we assume to be excellent in his own field of teaching children Chinese and well versed in all the Chinese classics and general culture of the language taught. As such, he cannot be denied the opportunity to earn a living by a regulation having no relation to that occupation, a useful, lawful, and highly skilled profession. Because there might be abuses in connection with this profession "is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way." (*Adams v. Tanner*, 244 U. S. 590, 594.)

This profession involving the right of freedom of speech, religion (and it should be again noted that Sunday schools are not exempt from this provision nor parochial schools of any kind), assembly, and thought, the fact that the regulatory features of the Act are somewhat different from the earlier Statute do not make them any less odious. As the area of the First Amendment is involved, the mere threat of censorship inherent in these licensing provisions coupled with the rest of the statutory provisions is sufficient to invalidate this section.

In addition, the requirement that parents must be certified by a board of examiners before they can by a regular and customary practice increase the knowledge of two or more of their children as a group in any field, is patently violative of the fundamental rights of custody and control which a parent may exercise over his child and of freedom of speech, assembly, religion and thought at the place where training in principles of liberty and freedom are most vital, the American home, still the most basic unit of

organization in our culture, whatever its customary language. The contention is made that the Statute will not be applied to parents, but this is of small comfort in view of its express language.

G.

Section Five of the Statute Is Invalid as an Arbitrary and Unreasonable Exercise of the Police Power.

Section five of the Statute provides for inspection of the "schools" by representatives of the department of public instruction of the Territory. The prior Act held unconstitutional in the *Farrington* case also provided for free visitation of foreign language schools by inspectors and agents of the department. (*Farrington v. Tokushige*, 11 F. 2d 710, 714.)

Appellants attempt to distinguish the present provision on similar grounds as section four (see above), that is: that the regulations do not go as far as the prior statute and the purpose is different. Neither of these contentions has validity in view of the facts and the law. Though some of the regulations in the prior statute were different from the ones in this statute, some going beyond these provisions (as with respect to textbooks), and others not as far (exemption of Sunday schools, Hawaiian language; application to only the first two grades, etc.) (p. 112), the inspection provisions were practically identical. Here, as with section four, the threat of censorship inherent in the provision is sufficient to invalidate the provision, the area of the First Amendment being involved. Also, whatever the purpose of the rest of the Statute, the purpose of the inspection provisions of the two statutes is the same, to allow public officials at any time to invade private assemblies to discover infractions of a law. This can no

more be sustained by a change of purpose than the prior provision.

Again, as with section four, the unreasonableness of the Statute as applied to professional teachers becomes tyranny and oppression in its harshest form when applied to parents, so harsh as to be unthinkable. On its face the Statute permits indiscriminate invasion of private homes at will by the inspecting authorities. The balancing of interests here more pointedly than with respect to any other portion of the Statute shows the patent invalidity of this Statute.

H.

The Statute Is Invalid as a Whole.

Though the inclusion of an express severability clause is entitled to due consideration, the effect is merely to create a presumption of separability.

Williams v. Standard Oil Co., 278 U. S. 235, 241-242.

Where basic civil liberties are involved, the presumption is the other way.

Thornhill v. Alabama, 310 U. S. 88;
Thomas v. Collins, 323 U. S. 516.

As in the case of *Thomas v. Collins*, there need not here be proof of an "abuse of power in the particular case. . . . (as) a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas." Appellees must comply with the whole of the statute in order to engage in their profession of teaching young children. That they could without an undue infringement on their rights or those of their patrons comply with some insignificant portions of the Statute does not make the Statute as a whole any the less odious or oppressive.

In regard to the provisions of the Statute, cases involving similar statutes, though with detailed provisions, have resulted in the declaration of invalidity of the entire Statute.

Cf., the *Meyer*, *Bartels*, *Pierce* and *Farrington* cases.

I.

The Act Is Unreasonable in That It Sweeps Within Its Ambit to Persons Other Than Those for Whose Welfare It Was Expressly Enacted.

For public officials to prohibit the acquisition of knowledge in any field by any person is, in light of our fundamental constitutional guarantees of liberty and freedom to the individual and academic freedom, a very serious matter and only the most urgent demands of public necessity should warrant such an interference with this right to acquire knowledge. When the citizen in his early formative years is concerned, such a prohibition should be examined, as already heretofore urged, with particularly careful scrutiny.

The legislature has made findings that "children of average intelligence in their early and formative years" are affected by the evil sought to be remedied by the Statute, and that the evil may be remedied by prohibiting formalized acquisition of knowledge in this field by children who have not completed the fourth grade or attained the age of nine or such child as is earlier able to "speak, write and read the English language and has attained a test score of at least 5.0 on standard tests in composition and reading"; and the acquisition of knowledge in this field thereafter regulated through the eighth grade or the age of fifteen years. The Statute omits any provision for persons who are of above or below average intelligence or for

children who may be able to pass the test mentioned in the findings or for those who reach the age of nine. By virtue of these omissions, the legislature has enacted a statute which patently is not designed to meet the evil legislated against, nor is the Statute designed to further its avowed purpose, to legislate to promote the best interest, health and welfare of children of tender age. Contentions made by appellants (Appellants' Br. pp. 80-89) that the legislative findings and intent support the application of the act to all children are refuted by the express language of those findings and the provisions of the Statute.

First, express recognition of an exception in the case where a child may pass certain tests earlier than the completion of the fourth grade shows that the legislature did not intend "average" to be interpreted to include all children, or even children generally.

Second, by providing in Section 3 that only those may continue the study of foreign languages who attain on certain tests scores "not lower than normal for his grade," it seems evident that the legislature intended "average" or even "normal" to be used in the sense of a mean and not in the broader sense advanced by appellants.

Third, by defining "school" in Section 2(a) to include only two or more in a group, the legislature showed further evidence that it did not intend this act to apply to all children; for one child, taught alone did not apparently suffer the retardation or emotional disturbance of those taught together.

Fourth, by the findings that Oriental languages caused the chief trouble in this, considering the circumstances in Hawaii, because of a divergent population, does not support legislation with respect to all children, whether their native tongue be English or otherwise.

Whether the broad interpretation of the findings and intent of the legislature urged by the appellants or the construction placed upon these by the District Court be used [R. 85], the fact remains that the findings do not support the application of the Act to all children and the combination of those who should have been excluded with those who might properly be included, under the findings, within its terms, renders the entire Statute invalid.

This Statute discriminates against not only those above average and their teachers and parents, but those who are below average in their attempt to find future occupations. For those below average who cannot pass these tests, considering the many children who support themselves in their early 'teens [R. 289, 360, 361, 467-468, 480, 492] and also considering the inadvisability of continued education, the spark of intelligence of early childhood is wasted without any opportunity accorded them to accommodate themselves under the direction of their parents and special teachers in a multilingual community.

The discrimination against those who cannot afford to hire private tutors for each of their children is also evident, besides that against the native English-speaking children who in a multilingual community are prohibited from learning languages which may be useful in assimilation or religious training or general cultural training. These discriminations are sufficient to render a state Statute invalid. No less so for a territorial statute. (*Hurd v. Hodge*, 334 U. S. 24, 35-36.)

Where basic freedoms are involved, the legislature must use particular care in drafting legislation to cover the narrow evil sought to be remedied. (*Thornhill v. Alabama*, 310 U. S. 88.)

II.

The United States District Court Below Had Jurisdiction and Exercised It Properly (Appellants' Points I-IV).[a]

Preliminary Statement.

Appellees posited jurisdiction of the United States District Court on 28 U. S. C. 41(1), 28 U. S. C. 41(14), 8 U. S. C. 43 and 28 U. S. C. 400[b] [R. 57]. Of course, if that court had jurisdiction under any of those sections, it had jurisdiction to pass upon the constitutional questions involved. Appellants have conceded that the District Court did have jurisdiction (B. 30, 31).[c]

Appellants have placed incorrect emphasis upon the so-called doctrine of abstention. The rule to be followed was declared by Justice Frankfurter speaking for this court in *Lane v. Wilson*, 307 U. S. 268, 274:

> "Barring only exceptional circumstances, see *e. g., Gilchrist v. Interborough Rapid Transit Co.*, 279 U. S. 159, or explicit statutory requirements, *e. g.*, 48 Stat. 775; 50 Stat. 738; 28 U. S. C. Sec. 41(1), resort to a federal court may be had without first exhausting the judicial remedies of state courts."

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[a]Originally appellees had grave doubts about the right of appellants to appeal directly to this Court. Upon further consideration, however, appellees are convinced that appellants do have the right. Accordingly appellees accept the position taken by appellants in their Point I. This section of appellees' brief, therefore, will be directed toward Points II, III and IV with which appellees do take issue.

[b]Appellees will refer to the old section numbers rather than the new ones since at the time of the hearings and decision in this case the old numbers were in effect.

[c]References to Appellants' Brief will be by the letter "B" followed by the page number, *e.g.* (B. 1).

Appellees, to vindicate their grievances do "not have to pursue whatever remedy may have been open to (them) in the state courts." (307 U. S. 268, 274.)

Therefore, unless appellants showed exceptional circumstances or an explicit statutory requirement, the District Court below properly granted the relief. Nowhere in the record nor in appellants' brief is there a showing of any exceptional circumstances as to why the District Court should not have acted, nor is there any explicit statute requiring that the District Court not have acted. Unless such a showing is initially made, the question of the District Court abstaining simply does not arise.

Indeed it might well be, in a case arising under 8 U. S. C. 43 (and its jurisdictional base—28 U. S. C. 41(14)), that the complainant is entitled to relief from the District Court without regard to the question of abstention.[a] Otherwise, the Civil Rights Act would not be given the liberal effect due it and the fundamental rights sought to be protected thereunder will be weighted down in a procedural bog. (*Cf.*, "To Secure These Rights," Report of the President's Committee on Civil Rights, U. S. Govt. Printing Office, 1947, pp. 112, 132.)

In any event, it is appellees' position that there is no question of procedure before this court, and that the case should forthwith be decided on the merits because the doctrine of *Hague v. Wilson* applies.

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[a] Appellants concede, and appellees agree, that the District Court had jurisdiction under 28 U. S. C. 41 (14). [B. 30, 31, and Appendix III thereto.] This is as true of the appellee school teacher, who is before this court and whose right to earn a living is a civil right (*Takahashi v. Fish & Game Commission*, 334 U. S. 410) as it is of the parents as to whose civil rights appellants concede the District Court had jurisdiction (B. 30, 31).

Out of an abundance of caution, however, appellees will proceed to answer the points raised by appellants' brief and will discuss them in the order there raised.

A. JURISDICTION OF THE UNITED STATES DISTRICT COURT WAS ESTABLISHED (Appellants' Point II).

Appellants and appellees are in agreement that as to the appellee school teacher, Leong Nget Cho, jurisdiction was established (B. 30) and that 28 U. S. C. 41(14) does apply to the Territory of Hawaii and that therefore the lower court erred in dismissing the action as to the two parents, Wah Chan Thom and Wilfred Chong, because of failure to establish the $3,000.00 jurisdictional amount (B. 31).

The parties are not in agreement, however, on the question as to whether the lower court had jurisdiction over the appellee school corporations. Our discussion will be divided into two parts: first, that the corporation appellees have established the $3,000.00 jurisdictional minimum; and second, that 28 U. S. C. 41(14) applies to corporations so that, assuming that section does apply to the Territory of Hawaii, no $3,000.00 minimum need be shown.

(1) The Jurisdictional Amount Was Shown (B. 31-33).

The lower court's finding that the corporation had established the jurisdictional amount is amply supported by the evidence [R. 111]. A summary of the pertinent evidence on this point clearly shows that the enforcement of the statute in question will:

1. "reduce the attendance (at the appellee schools by) one-half" [R. 19, 469];

2. "reduce the tuition fees to about one-half" [R. 19];

3. make it "impossible for (the appellee) schools to conduct their business and (they) will be compelled to close their doors" [R. 19];
4. "reduce the normal number of students to such a small number that the inevitable practical result will be the destruction of (appellees') primary schools" [R. 19].

Further that:

1. the provisions of the statute in question "are so drastic that the parents of children will be afraid to pay tuition fees and other persons will be afraid to contribute to the funds of said schools" [R. 19, 476, 486];
2. the average attendance at the appellee Mun Lun Chinese School prior to the closing thereof was 1,100, "and the annual fee received for each student amounted to about $18.00 per annum making a total of $19,800.00 per annum" [R. 52, 465, 485];
3. "from the 1st grade to the 4th grade inclusive, the average attendance (at Mun Lun Chinese School as of time of closing) was about 300 students paying an annual tuition fees of $4,500.00 per annum, or for the 4-year period making a loss of $18,000.00" [R. 53, 465];
4. the elimination of the high school at Mun Lo which taught about 200 students amounts to a loss in fees annually of $4,200.00 [R. 53, 465];
5. "average attendance (at the appellee Chung Shan Chinese School) prior to the time of its closing on December 7, 1941 . . . was 850, and the annual fee received for each student amounts to about $18.00 per annum making a total of $15,300.00 per annum . . . from the 1st grade to the 4th grade inclusive, the average attendance was about 300

students paying an annual tuition fees of $4,500.00 per annum, or for the four-year period making a loss of $18,000.00" [R. 53, 465];

6. the elimination of the high school course at Chung Shan would mean a loss of the annual fees of about 100 students or $2,400.00 per annum [R. 54, 465];

7. "the average attendance (at appellee Dai Kung Chinese School prior to closing) was 100 and the annual fee received for each student amounted to about $18.00 per annum making a total of $1,800.00 per annum, or for the 4-year period making a loss of $7,200.00" [R. 54, 465, 484];

8. the loss to the Muy Lun school from closing would also jeopardize the value of its real property and equipment which amounts to $105,000.00 and of its annual donations of $5,000.00 [R. 53, 465, 466, 474, 484];

9. the loss to the Chung Shan School's property and equipment resulting from the closing amounts to $105,000.00 and annual donation loss of $4,000.00 [R. 54, 465, 466, 474];

10. the loss to the Dai Kung school in property and equipment resulting from the closing of the schools amounts to $10,500.00 and annual donations loss of $500.00 [R. 54, 465, 466, 474, 484, 485];

11. All children between the ages of five and six are definitely prohibited from atfending the schools [R. 456];

12. Students who would first have to start learning the Chinese language—*i. e.*, go to the first grade at the appellee corporations' schools would not go to the schools [R. 467, 468];

13. Because of the statute there would be fewer children attending the Chinese language schools who are in

the 5th to the 8th grades in public school because the experience of the schools has been that the students in those grades in the public schools drop out of going to the Chinese language schools [R. 469];

14. If the statute is applied, only a few—not more than five—would go to the Chung Shan School's high school [R. 469];

15. If the statute is applied, the Chung Shan School would have only 200 students, all in the low grades [R. 470];

16. If the statute is not applied, the Chung Shan School would have at least 400 students [R. 471];

17. If the statute is applied, the appellee school corporations will be unable to make contracts with Chinese language teachers because those teachers would be unable to pass the English language test [R. 477, 493, 494];

18. If the statute is applied, parents are fearful of sending their children to the schools, but would send them if the statute is not in operation [R. 486, 487, 489, 490, 491];

In the light of all this evidence, it is clear that the appellee corporations showed that $3,000.00 is involved. Indeed the showing is overwhelming that far more than the $3,000.00 is at issue. To illustrate by way of one example: average attendance at one of the schools, Mun Lun, prior to closing brought in a revenue to the school of $19,800.00 [R. 52, 465, 485]. The proof is that if the statute is enforced, attendance will be cut in half [R. 19, 469]. It is a matter of simple arithmetic to see that one-half of $19,800.00 is over $3,000.00. And this is but for one year. Certainly, when it is considered that the disability caused by the statute will extend over many years,

it is clear without question that the $3,000.00 jurisdictional requirement has been shown.

McNutt v. General Motors Acceptance Corporation, 298 U. S. 178, cited by appellants is not in disaccord. The principle of that case is:

> "The object or right to be protected against unconstitutional interference is the right to be free of that (the statutory) regulation. *The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed.* The particular allegations of respondents' bill as to the extent or value of its business throw no light upon that subject. *They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve*" (at page 181, italics added.)

Appellees here have shown precisely what loss would follow the enforcement of the statute; they have also shown precisely what curtailment of business and consequent loss the enforcement of the statute would involve.

To take another example: the Chung Shan School, if allowed to reopen without the enforcement of the statute, would have an attendance of 400 [R. 471]. With an average tuition fee of $18.00 per student [R. 465], the revenue from tuition alone would be $7,200.00. The enforcement of the statute would mean that only 200 children would come to the school [R. 470]. Simple computation demonstrates that income from the tuition of these students would reduce appellee's income by $3,600.00 for but one year. Here again is ample proof that the amount in controversy exceeds the $3,000.00 requirement.

In *Pierce v. Society of Sisters*, 268 U. S. 510, 531, 532, the plaintiffs were corporations, as are two of the plain-

tiffs herein. What the Court said of the plaintiff corporation in the *Pierce* case applies to the instant case:

> "And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property.
>
> "The Compulsory Education Act of 1922 has already caused the withdrawal from its schools of children who would otherwise continue, and their income has steadily declined."

And in *Farrington v. Tokushige*, 273 U. S. 284, 298, this Court said:

> "Enforcement of the act probably would destroy most, if not all, of them (the foreign language schools) and, certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful."

Jurisdiction of the court below in the case at bar, just as in the cases above quoted, is thus amply shown.

Appellants speak as though in order for the appellee language schools to show damage they must show that the first four grades will be entirely eliminated (B. 32). It is clear that complete destruction is not necessary. All that need be shown is substantial loss (*cf.* the *McNutt* case, *supra*). If, because of the enforcement of the statute, students above the fourth grade in the public schools will not begin in the first grade in the language schools either because of shame or the burden of work [R. 467, 468], a sufficient showing of loss is made—particularly, since the number of students in the first four grades constitutes one-fourth of the attendance [R. 42].

Indeed the showing has been made, if that be necessary, that not only the first four grades would be eliminated, but the schools themselves would be destroyed [R. 477, 482, 493].

Looking at the picture from the other side of the schooling cycle,—that is from the high school side, here again there has been ample demonstration of more than a $3,000.00 loss. In Hawaii, it is quite normal and usual for the young people to begin making their own living at the age of 15 [R. 80, 288, 360, 361]. Thus, if their Chinese language schooling is postponed until they have passed the fourth grade in public school, it means that they commence their Chinese language learning at age 10, in the first grade of the Chinese language school. They would go only through the sixth grade in language learning, and then go out to work. Accordingly the upper, or high school, classes of the schools would be effectually eliminated. The loss so occasioned at the Mun Lo School from loss of tuition fees amounts to $4,200.00 annually at that school [R. 53, 465]; at the Chun San School this loss is $2,400.00 per annum [R. 54, 465].

Appellants argue that in order to show a loss because of the inability to obtain teachers, respondents would have to show that they could obtain *no* teachers (B. 33). Here again they speak in absolutes. It is submitted that no such absolute showing need be made. Utter destruction is not required. In the *Farrington* case, 273 U. S. 284, similar problems and difficulties in obtaining teachers were held sufficient by this Court. Appellees have shown with sufficient certainty their inability to obtain teachers who can qualify under the law, and still be competent to teach the Chinese language [R. 493, 482, 197];

And in any event (though there is no reason for the Court to reach this point); it having been established that appellee Leong Nget Cho suffered the jurisdictional loss [R. 101, B. 30], the District Court had jurisdiction to determine the constitutionality of the statute in issue, as this Court did in the *Pierce* and *Farrington* cases, *supra*.

(2) 28 U. S. C. 41(14) Applies to Corporations (B. 30).

Appellants' citation of *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 514 (B. 30), in support of their claim that the appellee corporations are entitled to no relief under 28 U. S. C. Sec. 41(14) is inapposite. In the *Hague* case, this Court ruled merely that "natural persons, and they alone, are entitled to the privileges and immunities which §1 of the Fourteenth Amendment secures for 'citizens of the United States.'" 28 U. S. C. 41(14) is broader, however, and gives protection to "any *person* to redress the deprivation under color of any law . . . of any *right*, privilege, or immunity, secured by the Constitution of the United States." (Italics added.) Thus the section gives protection to a "person" to redress a "right." In the *Hague* case this Court confined its consideration to the question as to whether a "privilege or immunity of a citizen of the United States" (p. 512) was being infringed upon. The question as to whether a "right" of a "*person*" was infringed, was not considered.

While it is clear that a corporation is not a "citizen" within the privilege and immunities clause (*Hague* case, p. 514), it is equally manifest that a corporation *is* a "person" entitled to the protection of its "rights" under the

Constitution. Thus, in *Covington and Lexington Turnpike Road Co. v. Sandford*, 164 U. S. 578, 592, this Court said:

> "It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws."

This rule has never been departed from. See, for example, *Pierce v. Society of Sisters*, 268 U. S. 510, and the many cases cited at U. S. C. A. Constitution, Part 3, page 101.

Indeed the very point urged herein by appellees, has been heretofore sustained. (*Northwestern Fertilizing Co. v. Hyde Park*, 18 Fed. Cas. No. 10,336; *Anglo-American Provision Co. v. Davis Provision Co.*, 105 Fed. 536.)

While most of the cases which have decided that a corporation is a person entitled to this protection have dealt with the property subdivision of the due process clause of the 14th Amendment, the same rule is applicable to the property subdivision of the due process clause of the 5th Amendment. (*Cf., Farrington v. Tokushige*, 273 U. S. 284, 299; *County of San Mateo v. Southern Pacific Railroad Company* [the Railroad Tax Cases], 13 Fed. 722, 746, App. Dis. 113 U. S. 138.)

Accordingly it follows that that part of 28 U. S. C. 41(14) which refers to "persons" and "rights" applies to corporations although that part of the section which refers to "citizens" and "privileges and immunities" does not. To hold otherwise would be to write out of the statute the words "person" and "right." This the Court will not do. (*McDonald v. Thompson*, 305 U. S. 263, 266.)

B. APPELLEES HAVE STATED A CAUSE OF ACTION FOR EQUITABLE RELIEF. (Appellants' Point III.)

Pierce v. Society of Sisters, 268 U. S. 510, and *Farrington v. Tokushige*, 273 U. S. 284, have settled, it would seem, the precise question. In both those cases the argument was made that the United States District Court should not have issued the injunction because no cause of action in equity had been shown. And in both cases, on facts substantially identical to those at bar, this Court found ample grounds for equitable relief.

In the *Pierce* case, the trial was by a three-judge court, as in the instant case. But in that case the suit for injunction in the United States District Court was brought some time before the state statute was even to go into effect. Said this Court (at pp. 535, 536 of 268 U. S.):

> "Generally it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the state upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any *proper* power. Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons, and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in Truax v. Raich, Truax v. Corrigan, and Terrace v. Thompson, *supra*, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers. (Citing cases.)
>
> "The suits were not premature. The injury to appellees was present and very real,—not a mere possibility in the remote future. If no relief had been

possible prior to the effective date of the act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well-recognized function of courts of equity."

Both the above cases are so close to the case at bar that they furnish sufficient authority for the holding by the lower court that a cause of action for injunctive relief was presented and in denying the motion to dismiss. If the law be that whether a federal court will issue an injunction to restrain the enforcement of a territorial statute depends upon the facts in the individual case, it is submitted that the factual basis in the instant case, just as it was in the *Pierce* and *Farrington* cases, is sufficient. There is surely no good reason for this Court holding that causes of action for injunction were present in the *Pierce* and *Farrington* cases and not in the instant case. There is no basis for distinction, between the *Pierce* and the *Farrington* cases, and the instant case; the causes of action alleged are identical.

Moreover, while perhaps it was inevitable because of the nature of the problem, appellants' arguments in their Points III and IV overlap. There are two problems: (1) whether a cause of action for equitable relief is stated (discussed above) and (2) whether, if such a cause of action is stated, a United States District Court should exercise that power in adjudging a territorial statute to be unconstitutional. Appellees will discuss this second point below under Point III.

Because there are the two distinct problems involved, it should be initially understood that the question as to whether a cause of action for relief in equity has been stated is to be determined by the relief that can be granted

in the United States District Court and not by the relief that can be granted by the Territorial courts. (*American Federation of Labor v. Watson*, 327 U. S. 582, 594, and *Di Giovanni v. Camden Fire Ins. Assn.*, 296 U. S. 64, 69.) This distinction, which appellants have failed to note, is well illustrated in the *Watson* case where this Court found grounds for equitable relief but declined to exercise it because it found present in that case considerations deemed sufficient to apply a policy of abstention. The fact that there is a method of challenging the statute in the Territorial courts (B. 33, 39) has nothing to do with the question as to whether a cause of action for equitable relief is stated. "If a plaintiff is entitled to be heard in the federal courts he may resort to equity when the remedy at law there is inadequate, regardless of the adequacy of the legal remedy which the state courts may afford." (*Di Giovanni v. Camden Fire Ins. Co.*, 296 U. S. 64, 69.)

Appellees submit that they have amply shown their right to equitable relief in accordance with the cases.

Terrace v. Thompson, 263 U. S. 197, is particularly *appropos* here; in that case, also, the Attorney General of the state argued that the plaintiff below had no right in equity to enjoin enforcement of the Washington Alien Land Law because the constitutionality of that act could be tested by the state bringing an escheat action following the plaintiff's making the lease. Said this Court (p. 215):

> ". . . And assuming, as suggested by the attorney general, that, after the making of the lease, the validity of the law might be determined in proceedings to declare a forfeiture of the property to the state, or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against them until after the consumation of the pro-

posed lease. The threatened enforcement of the law deters them."

So in the instant case.

There is no conceivable way under the statute in the case at bar, for the corporation appellees to be reimbursed for the expense to which they will have to go to set the schools in operation pending the institution by appellants of an action in the Territorial courts. Nor, as the *Terrace* case points out, should the corporation appellees be required to take this step in order to have the aid of equity. As there decided, the *other* remedy, which the Attorney General would *always* have the complaining litigant pursue, "must be as complete, practical and efficient as that which equity could afford." (263 U. S. 197, 214.)

And insofar as the school teacher appellee is concerned, the Territorial remedy suggested by the appellants (B. 36) has absolutely no application at all to him. His is the right to earn a living by teaching the Chinese language. He cannot open a school. If the corporation appellees are unable or unwilling, because of the large expense and difficulities involved, to operate under the statute, the school teacher does not even have the method open to him which appellants suggest he ought to have taken in the first place. To decline him his remedy in equity would truly leave him remediless.

Other cases which support the instant case on the equity question are: *Toomer v. Witsell*, 334 U. S. 385; *Truax v. Raich*, 239 U. S. 33; *Pierce v. Society of Sisters*, 268 U. S. 510; *American Federation of Labor v. Watson*, 327 U. S. 582, and *Farrington v. Tokushige*, 273 U. S. 284. Indeed the *Pierce* and *Farrington* cases would seem to have definitely established that precisely in the type of case at bar is equitable relief proper.

C. APPELLEES HAVE STATED A CAUSE OF ACTION FOR DECLARATORY REIEF (B. 38, 39).

The argument that because appellees sought a preliminary injunction, they thereby showed that there was not too great a risk of expense and therefore they are not entitled to declaratory relief under 28 U. S. C. 400 (B. 39) is without substance.

It is *not* the law that in order for a party to be entitled to declaratory relief, he must first show that otherwise he will be subject to great hazard. There need only be an adversary proceeding involving the protection "of rights arising under the Constitution and laws of the United States." (*Nashville, Chatanooga and St. Louis Ry. v. Wallace*, 288 U. S. 249, 264.)

Contrary to the implication made by appellants, in order to be afforded declaratory relief, one need not bring himself within the usual equitable doctrines such as irreparable injury (*United Public Workers v. Mitchell*, 330 U. S. 75, 93), or inadequate remedy at law. (*Columbian Nat. Life Ins. Co. v. Foulke*, 89 F. 2d 261, 263 (C. C. A. 8, 1937).) Neither the statute nor the cases so hold. Indeed, Rule 57 of the Federal Rules of Civil Procedure specifically provides that "the existence of another adequate remedy does not preclude a judgment for declaratory relief . . . ."

Appellants' argument "that appellees might readily have opened their schools and operated them the way they wanted to in defiance of the statute, pending adjudication of its validity in an enforcement proceeding in the territorial court . . ." (B. 39) has been repeatedly rejected by the courts. The Declaratory Judgment Act is intended to save a litigant from that very risk and hardship. (*Cf. Columbian Nat. Life Ins. Co. v. Foulke*, 89 F. 2d 261, 263 (C. C. A. 8, 1937).)

Nor does appellants' argument that in order to have declaratory relief the plaintiff must show some great risk (B. 39) have merit. In *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 241, this Court pointed out that:

> ". . . it is not essential to the exercise of the judicial power (through declaratory relief) that an injunction be sought, allegations that irreparable injury is threatened are not required."

The purpose of the declaratory relief statute is to declare rights. Accordingly, the moving party in such an action is often the party against whom, just as in the case at bar, proceedings would normally be instituted. So, in *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U. S. 270, 273, this Court held:

> "It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case."

Declaratory relief is precisely designed for just such a case as the present one. It is for the purpose of laying at rest uncertainties; and to obviate the necessity for a party to incur expenses or damages or possible suit in order that he may know his legal rights. See *E. Edelmann & Co. v. Triple-A Specialty Co.*, 88 F. 2d 852, 854 (C. C. A. 7, 1937), cert. den. 298 U. S. 680, and *Gully v. Interstate Natural Gas Co.*, 82 F. 2d 145, 149 (C. C. A. 5, 1936).

That declaratory relief is proper to challenge the constitutionality of a statute can, of course, no longer be gain-

said (*United Public Workers v. Mitchell*, 330 U. S. 75, 93.)

In words written as though the instant litigation were in mind, Professor Borchard says in his work on Declaratory Judgments[1]:

(Page 766) "Nor, where constitutionality may be raised, is there more necessity for simplicity of adjudication for the individual and the community who must know at the earliest opportunity whether they are living under constitutional or unconstitutional laws, for delay may bring uncertainty and difficulties of all kinds."

(Page 784) "Legislation dealing with civil liberty, such as freedom of worship and *freedom in establishing or attending schools*, has been tested in this way." (Italics added.)

(Page 786) "All that the plaintiff would be required to show, as in the *Ambler* (*Euclid v. Ambler Realty Co.*, 272 U. S. 365), *Pierce* (*Pierce v. Society of Sisters*, 268 U. S. 510), and other cases, is that the enactment of the statute creates a threat, jeopardy or burden which impairs materially the plaintiff's business."

Hence, it is clear that the amended complaint and the evidence adduced at the trial, give ample ground to support a declaratory judgment.

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[1]Borchard, "Declaratory Relief" (Banks-Baldwin Law Publishing Co., 1941). See also pages 280-288

D. THE UNITED STATES DISTRICT COURT PROPERLY EXERCISED JURISDICTION IN THIS CASE (Appellant's Point IV).

(1) Appellants by Neglecting to Take Advantage of the Right Given Them by 28 U. S. C. 380 to Obtain a Decision by the Territorial Court Cannot Now Complain Because of the Lack of Such a Decision.

After arguing in their Point I that Judicial Code Section 266 (former 28 U. S. C. 380, now Title 28 U. S. C. 1253, 2101, 2281 and 2284) is applicable to Hawaii, appellants in their Point IV proceed to utterly ignore the statute's existence and to emasculate its import (B. 48).

That section itself sets up the procedure whereby appellants themselves could have obviated the situation which they now argue is a ground for this Court to send the case back on a procedural point, and thus avoid a decision on the merits from this Court. The section states:

> "It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State."

Thus if appellants had been in reality as concerned about first obtaining a ruling by the Territorial courts, either as to the constitutionality or an interpretation of the Territorial act challenged herein, all they need have done was file a suit in the Territorial courts and the very

proceedings of which they now complain would have been automatically stopped or abated. Section 266 goes so far as to provide that if such a suit is started in the Territorial courts and is not prosecuted in good faith, the stay in the federal 3-judge court will be vacated and the case will proceed in the United States District Court. The case at bar, indeed, is stronger. Here appellants did not even start a proceeding. Clearly, therefore, the United States District Court should, as it did, decide the case. Any other ruling would render nugatory the clear meaning of Section 266.

The section was an open invitation to the appellants to halt the proceedings in the District Court, if they so desired. They should not now be permitted to take advantage of their own inactivity to defeat a decision on the merits. See *Modern Woodmen of America v. Casados*, 17 Fed. Supp. 763 (D. C. N. M. 1937), and *Department of Agriculture & Markets v. Laux*, 223 Wisc. 287, 270 N. W. 548.

In the latter case it was squarely held that the defendants in the federal action under Section 266 could sue in the state court, obtain a stay in the federal court, and obtain a declaratory judgment on the constitutionality. This was precisely the action that was open to appellants herein.[5] Appellants should not be permitted to blow both hot and cold: sit tight while the trial is going on in the federal court when all the time they had it within their power to stay the proceedings and then, after having lost, say that the federal court should not have acted at all.

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[5] Sections 9971-9976, Revised Law of Hawaii, 1945, as amended by Act 74, Series D-172, Laws of the Territory of Hawaii, Regular Session of 1945.

The statute is a highly salutory and remedial one. It is not one through which parties aggrieved by an unconstitutional state or territorial statute can be kept dangling at the end of a string.

(2) The Doctrine of Deference Constitutes No Barrier to the Action Taken by the District Court (B. 40-42).

It is respectfully suggested that appellants have misapplied the doctrine of deference to this case. The very cases cited by appellants (B. 41) establish that that principle is nothing more than the principle of *Erie Railway v. Tompkins* applied to the Territories. Thus this Court said in *De Castro v. Board of Commissioners*, 322 U. S. 451, 459 (B. 41):

> "Once understood what deference is to be paid, the problem is comparable to that presented when, upon appeals from federal district courts sitting in the states, the federal appellate courts are required to follow state law under the rule of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487."

Thus, whereas in regard to states, there is a specific statutory rule (28 U. S. C. 725, new Title 28, U. S. C., Section 1652) to which *Erie Railway v. Tompkins* finally gave its true effect, this Court has quite properly established the same rule in regard to the Territories; particularly where, as in the *De Castro* case, the court was dealing with matters of "purely local concern" (322 U. S. 451, 457).

Where there is a state construction of a state statute, the Federal Courts, pursuant to *Erie Railway v. Tompkins*, must give "deference" just as they must, pursuant

to *De Castro v. Board of Commissioners*, to a territorial construction of a territorial statute. But where there is no such construction, neither the doctrines of *Erie Railway v. Tompkins* nor of deference require the United States District Court to "await state court construction before passing on constitutionality" (B. 40). In such a case the Federal Courts must, in the nature of things, arrive at their own construction just as they did in *Pierce v. Society of Sisters*, 268 U. S. 510, to which appellants take exception (B. 45), and just as this Court is doing to this very day. (See *King v. United Commercial Travelers*, 333 U. S. 153; *Fidelity Union Trust Co. v. Field*, 311 U. S. 169; *Meredith v. City of Winter Haven*, 320 U. S. 228; *Markham v. Allen*, 326 U. S. 490.)

The other case cited by appellants (B. 41) *United States v. Fullard-Leo*; 331 U. S. 256) clearly supports appellees. In that case, after referring to the local deference—*Erie Railway v. Tompkins*—rule of the *De Castro* case, this Court pointed out that where the court is "dealing . . . with a problem of Federal law . . . the federal courts construe the law for themselves" (331 U. S. 256, 269).

Thus it is seen that there is no occasion to apply the deference principle here because the Court is dealing, as in the *Fullard-Leo* case, with a problem of Federal law. However, if it be deemed that the case involves a problem of purely local concern, which appellees submit it does not, the lower court properly applied its own construction in accordance with the principle of *King v. United Commercial Travelers*, *Fidelity Union Trust Co. v. Field* and *Pierce v. Society of Sisters*, *supra*.

(3) The Doctrine of Abstention Does Not Apply as Between the United States District Court in Hawaii and the Territorial Courts With the Same Force That It May Apply as Between the United States District Courts and the State Courts (B. 40).

The same considerations of judicial policy which might be urged against a United States District Court enjoining the enforcement of a State statute do not apply to a statute of the Territory of Hawaii.

With regard to a State statute, considerations greater than comity apply. It is indeed a question of giving effect and preserving the Federal or "dual system of government" (*Watson v. Buck*, 313 U. S. 387, 401). There is no such fundamental relationship between a United States District Court and Territorial statutes or Territorial courts.

The Territorial courts are in effect but part of the Federal system of courts. Thus an appeal from the highest court in Hawaii lies with the Court of Appeals for the Ninth Circuit and not with the United States Supreme Court as is the case of the highest state courts (28 U. S. C. 225(a), now 28 U. S. C. 1293 and 1294).[h]

More important, however, is the fact that the powers exercised by the Territorial government and its courts all

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[h]Appellants in this very case have indicated that they are not too concerned about a decision by that highest court to which an appeal from the Territorial Courts may be taken. Witness their Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit Before Judgment (*Stainback v. Po*, No. 474, Oct. Term 1948 in this Court), nothing is to be gained, therefore, by sending the case back to go through the Territorial Courts and back to the Court of Appeals for the Ninth Circuit, a decision by which, apparently, is not too important to appellants.

stem from the powers delegated thereto by Congress. Therefore the constitutional limitations are measured by the power given Congress by the Constitution rather than by the power reserved to the States by the Constitution. There is no denying that the entire government of the territory, including the courts themselves, are creatures of Congress and subject to its control. See Organic Act (Act of April 30, 1900, 31 Stat. 141, 48 U. S. C. 491 *et seq.*, particularly 631-636).

Moreover, the very territorial judges, before whom appellants would now try this case, are appointed by the President of the United States by and with the consent of the United States Senate (48 U. S. C. 633); and the very same President and Senate appoint the United States District Judges in precisely the same manner (48 U. S. C. 643). There are, therefore, not the same reasons for a United States District Judge abstaining in favor of Territorial Judges as there might be in favor of State Judges. For the latter are elected by the people of the States or appointed by the Governors thereof.[hh]

Because of this all encompassing Congressional—Federal—control, the argument that the Federal Courts might first desire state interpretation is not nearly so pressing, if indeed at all applicable. This is so because the interpretation by any court in Hawaii would be Federal interpretation.

Accordingly it follows that there is no compelling reason why the plaintiffs must be first required to go to a Territorial Court as appellants would now have them do.

[hh] E. g., Cal. Const. Art. VI, Sec. 26.

(4) The Doctrine of Abstention Is Not Applicable in This Case.

Though appellees have spent considerable time in pointing out that appellants should not now be permitted to cause the case to go back again along the long judicial path, appellees submit that in any event the case at bar presents that type of case wherein this Court should act.

Appellees again emphasize (see Preliminary Statement, *supra*, p. 46) that, jurisdiction in the District Court having been established, the correct rule is not the negative one contended for by appellants (B. 42) that the Court will not act unless there is some special reason for it so to do. The rule is positive that the Court *will* act *unless* there are special circumstances or explicit statutory prohibitions as to why it should not. (See *Lane v. Wilson*, 307 U. S. 268, 274; *Toomer v. Witsell*, 334 U. S. 385, footnote 15; and *cf., Markham v. Allen*, 326 U. S. 490; *Meredith v. City of Winter Haven*, 320 U. S. 228.) Otherwise, the many cases wherein federal court action against state statutes has been approved have been incorrectly decided. We submit that they were not.

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[1] *E.g., inter alia: Toomer v. Witsell*, 334 U. S. 385; *Public Utilities Com. v. United Fuel Gas Co.*, 317 U. S. 456; *Hines v. Davidowitz*, 312 U. S. 52; *W. Va. State Bd. of Education v. Barnette*, 319 U. S. 624; *Hague v. Committee for Industrial Organization*, 307 U. S. 496; *Home Tel. & Tel. v. Los Angeles*, 227 U. S. 278; *Pierce v. Society of Sisters*, 268 U. S. 510; *Farrington v. Tokushige*, 273 U. S. 284; *Terrace v. Thompson*, 263 U. S. 197; *Tyson & Bro. v. Banton*, 273 U. S. 418; *Champlin Refining Co. v. Corporation Commission*, 286 U. S. 210; *Truax v. Raich*, 239 U. S. 33; *Sterling v. Constantin*, 287 U. S. 378, and *cf. Meredith v. City of Winter Haven*, 320 U. S. 228; *Polk Co. v. Glover*, 305 U. S. 5; *Gibbs v. Buck*, 307 U. S. 66; *Buck v. Gallagher*, 307 U. S. 95; *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165; *Ex parte Royall*, 117 U. S. 241; *Ex parte Young*, 209 U. S. 123; *Markham v. Allen*, 326 U. S. 490, 495: "The mere fact that the district court, in the exercise of the jurisdiction which Congress has conferred upon it, is required to interpret state law is not in itself a sufficient reason for withholding relief to petitioner."

But in any event the instant case falls without the cases relied on by appellants (analyzed below) and falls within an entirely different line of cases. See footnote "i," *supra*.

In the first place the statute requires no interpretation. There is no ambiguity, it is clear on its face. Section 3 [R. 12, B. 100] clearly provides that no child shall be taught a foreign language in any school if he has not "passed the fourth grade in public school or its equivalent." That language certainly does not permit of any construction or interpretation. It very clearly states that if a child is in the 1st, 2nd, 3rd or 4th grades, he cannot go to a school and be taught a foreign language. No twisting or turning by the Territorial Court could change that meaning. The statute is admirable in its simplicity and clarity.

Nor does Section 4 [R. 13, B. 101] require any interpretation insofar as the appellee school teacher is concerned. There is no controversy but that Leong Nget Cho is a competent Chinese language teacher and that he is not reasonably well versed in the usage and idiom of the English language [R. 61, 197]. No possible construction by the Territorial Court could change the meaning of Section 4 insofar as Cho is concerned. Under it he is simply deprived of his right to earn his living by teaching.

Secondly, there is no interpretation possible which the Territorial Court could give the statute which would eliminate its constitutional infirmity. Even if the lower court were incorrect in its determination as to the meaning of "average" and the appellants' interpretation is correct and would be followed by the Territorial Court, the statute is still left wanting in that it prohibits the teaching of foreign languages to those bright students who are above "medium character, quality; midway between extremes, ordinary" (B. 81).

Further, even if the Territorial Court were to construe the word "school" in Section 2(a) [R. 12, B. 100] (contrary to its very plain language and to appellants' own proper interpretation [R. 137]) so as not to include the hiring by parents of tutors to teach their children, Section 3 still says that children in the first four grades cannot go to the corporation appellees' schools nor could the school teacher appellee teach therein. It is precisely because of this disability placed upon them by the statute that appellees came to court and upon which question they are entitled to a decision.[j]

Thirdly, it is significant that nowhere is the claim made by appellants that the correct interpretation of the statute (supposedly to be made by the Territorial courts) *is* that parents could or that they would be permitted to hire tutors to teach their children, and thus fall without the meaning of the word "school" of Section 2(a). Appellants cannot complain that the Territorial courts should first interpret the statute when they agree that the construction given by the lower court is correct. With all parties in agreement, the Territorial Court would have no controversy to decide.[k]

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[j] Nor are appellants correct when they say it matters not what effect the statute has on the parents (B. 47). The same question was present in *Pierce v. Society of Sisters*, 268 U. S. 510, 534, where this court held that the Oregon act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control" although only the corporation appellee had brought suit and was before this Court on appeal. Such a decision is proper and, indeed, inevitable in a case of this type.

[k] Furthermore even if the statute were to be interpreted to the effect that parents could so hire tutors to teach, the statute is nevertheless invalid because of the discrimination against those parents who have the constitutional right to have their children taught a foreign language, but who are unable to afford the luxury and expense of private tutors. Similarly it deprives those children of poorer parents of their right to learn the foreign language. And see footnote j.

Thus appellants are incorrect, therefore, in their assertion that if the Territorial courts follow their interpretation of the statute, the constitutional invalidity dissolves (B. 45). They have shown no reason for this Court to refuse a decision on the merits. The ensuing analysis of appellants' authorities will demonstrate their inapplicability.

Every case relied on by appellants (B. 40, 42, 46, footnote 34) falls clearly within the exceptional circumstances rule of *Lane v. Wilson*, 307 U. S. 268, 274.

Thus in *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, the constitutionality of a local administrative ruling of the Texas Railroad Commission was being tested. The validity of that ruling depended upon powers given the local Texas Commission by a Texas statute whose validity was not being questioned. Under these special circumstances, this Court applied the doctrine of abstention.

There are in the case at bar no such special circumstances. There is here no local administrative ruling whose validity depends upon an interpretation to be given to some other local law whose interpretation is not before this Court. Further, there is no way the questions in the case at bar could be resolved so as to eliminate the constitutional questions (see discussion, *supra*, following footnote "i").

In *American Federation of Labor v. Watson*, 327 U. S. 582, there was involved a complicated question concerning a new provision of the Florida constitution. Moreover, *quo warranto* proceedings were already pending in the Florida state courts encompassing the very parties and actions before this Court. Here too, then, were special

circumstances justifying awaiting the determination of the state proceedings. This was right in line with the intent of Section 266 of the Judicial Code (28 U. S. C. 380).

No such circumstances are present here. The statute in question is not a new one. It is substantially identical with that held invalid in *Farrington v. Tokushige*, 273 U. S. 284. Furthermore, there are no suits pending in the Territorial courts upon which the federal court could await a determination.

Stephenson v. Binford, 287 U. S. 251, presented a broad and complicated statute of some 22 or more sections. In addition the state authorities had made no threat to enforce any of the provisions of the statute against any of the plaintiffs. Thus the case properly did not call for decision on the merits because a cause of action in equity had not been made (see Point IIB, *supra*). Nevertheless, the Court, after alluding to the fact that no state court had passed on the question, proceeded to adjudicate the merits of the dispute. To the extent that the case is of any assistance at all here, it supports appellees' and not appellants' position.

Spector Motor Service v. McLaughlin, 323 U. S. 101, again involves an extremely complicated question of local law, the resolution of which might largely obviate any federal constitutional question. These again were special circumstances justifying abstention. Furthermore, it might be pointed out that the action was brought to enjoin the enforcement of a state tax and this Court pointed out that there was an adequate remedy in Connecticut to

determine its validity. Accordingly federal abstention was proper because of the "explicit statutory requirement" of the last sentence of 28 U. S. C. 41(1). (See *Lane v. Wilson*, 307 U. S. 268, 274.)

Of course, *Rescue Army v. Municipal Court*, 331 U. S. 549, a case which did reach this Court through the state courts, is merely an application of the settled doctrine of the courts not to pass upon constitutional questions unless it is necessary. Particularly is this so where, as in the *Rescue Army* case, the statutes are highly complex and interrelated and where other statutes have been incorporated by reference whose import and construction have not been determined by the court below and where the issues come to this Court in a highly abstract state (there on a Writ of Prohibition).[1]

None of these considerations is present in the case at bar. There is but one statute, a simple one—not interrelated or interwoven or depending upon other statutes referred to by reference—and the case comes here after a full and complete trial wherein all the facts were developed.

Watson v. Buck, 313 U. S. 387, is not an abstention case at all. Since the state officials had not threatened to

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[1] To the same effect are *Musser v. Utah*, 333 U. S. 95; *United States v. Petrillo*, 332 U. S. 1; and *Federation of Labor v. McAdory*, 325 U. S. 450. To the extent that *United Public Workers v. Mitchell*, 330 U. S. 75, is helpful here it supports appellees, for the court did pass upon the merits of the claim of unconstitutionality (330 U. S. 75, 93). It cannot be said in the case at bar that there is no case or controversy. This is certainly not a "friendly" suit and appellants by their threat to enforce the statute are abridging the fundamental rights of appellees to their immediate and present damage.

enforce any specific provision of either of the two laws before the Court (313 U. S. 387, 399, 400), there was simply no such threat as would warrant the intervention of equity.[m] In the case at bar, of course, there is no question but what appellants threaten and intend to enforce the particular sections being challenged [R. 57, 68, 73, 76].

It thus appears clear that appellants have made out no case for the application of the doctrine of abstention and that the lower court properly proceeded to decide the case on the merits.

In *Public Utilities Com. v. United Fuel Gas Co.*, 317 U. S. 456, 462, 463, this Court stated the rule that applies here:

> "The situation here is quite different from Railroad Commission v. Pullman Co., 312 U. S. 496, 85 L. Ed. 971, 61 S. Ct. 643. Where the disposition of a doubtful question of local law might terminate the entire controversy and thus make it unnecessary to decide a substantial constitutional question, considerations of equity justify a rule of abstention. But where, as here, no state court ruling on local law could settle the federal questions that necessarily remain, and where, as here, the litigation has already been in the federal courts an inordinately long time, considerations of equity require that the litigation be brought to an end as quickly as possible."

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[m] In addition there were 42 sections of "a broad comprehensive and multi-provisioned statute" (313 U. S. 387, 400). Contrast this with the case at bar which has but 8 sections including the section as to when the act shall take effect and of which only 3 (Sections 2, 3 and 4) are really involved. Thus if the *Watson* case be, though we submit it should not be, considered an example of the application of the abstention doctrine, it clearly falls within the exceptional circumstances rule of *Lane v. Wilson*, 307 U. S. 268, 274.

Clearly under that decision the instant case should be decided on the merits. The delay in the instruction of the children in Hawaii of the Chinese language has proceeded long enough. Appellants should not be permitted to delay any longer. Witness the following chronology:

1. The schools were closed on December 7, 1941, by military fiat [R. 429];
2. The statute in question went into effect on July 1, 1943 [R. 47, B. 103];
3. The military orders under which the schools were closed were declared illegal by this Court in *Duncan v. Kahanamoku*, 327 U. S. 304, on February 25, 1946;
4. The complaint was filed on November 22, 1946 [R. 3]. The appellants took no action under Judicial Code Section 266 to obtain a territorial determination, though they could have;
5. The application for a preliminary injunction was pending until and denied on January 28, 1947 [R. 115]. Still the appellants took no action under Section 266, though they could have;
6. The matter was pending for trial until June 26, 1947 [R. 118] and through June 28, 1947, when final hearing was held [R. 121]. Still the appellants had taken no action under Section 266, though they could have;
7. Judgment was entered on January 24, 1948 [R. 107].
8. Amended judgment was entered on February 11, 1948 [R. 113].

Under Judicial Code Section 266 appellants had had it within their power for over seven months prior to final hearing in the trial court to obtain the territorial interpretation, which they now claim so important, and to obtain a stay of these very proceedings. They took no action during all that time. Now an additional year and one-half has elapsed and appellants seek further delay. In the meantime the children of Hawaii have already been deprived of foreign language instruction for more than seven years. If *Public Utilities Comm. v. United Fuel Gas Co.*, 317 U. S. 456, 462, 463, means anything at all, it means that this "litigation should be brought to an end as quickly as possible" by this Court rendering a decision on the merits.

Toomer v. Witsell, 334 U. S. 385, should be directly applied to the case at bar. In that case this Court thus answered (at note 15) the same argument raised by appellees here:

> ". . . We agree with the District Court that there is neither need for interpretation of the statutes nor any other special circumstance requiring the federal court to stay action pending proceedings in the State courts."

Here too (1) there is no need for territorial interpretation; (2) in order to test the statute, as suggested by appellants, in the Territorial courts by opening the schools and awaiting a suit to be brought by the appellants would entail expense for which there is no means of recovery; (3) inability to run the schools or running them at the reduced capacity which the statute requires would result "in a substantial loss of business for which no compensation could be obtained"; and (4) the case has already been in the courts long enough, considering the fact that

the years taken out of the lives of the children who are awaiting to start and to complete their language studies can be in no way replaced. A certain number of children in Hawaii will already have to go without that instruction. This Court should not add to that number.

Accordingly appellees were and are properly entitled to the relief sought and granted by the lower court and to a ruling by this Court on the merits of the case, and on the constitutionality of the challenged Territorial statute.[n]

Conclusion.

The judgment of the trial court should be affirmed.

Respectfully submitted,

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Attorneys for Appellees.

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[n]Appellants' suggestion that if the doctrine of abstention does apply, the case should be dismissed is incorrect. The procedure this court has followed is to "remand the cause to the District Court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptness in the State court. *Spector Motor Service v. McLaughlin*, 223 U. S. 101, 106; *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, 501, 502; to the same effect *American Federation of Labor v. Watson*, 327 U. S. 582, 590.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 52

INGRAM M. STAINBACK, WALTER D. ACKERMAN, JR., AND W. H. LOPER,

Appellants,

vs.

MO HOCK KE LOK PO, AN ELEEMOSYNARY CORPORATION, DAI KUNG CHINESE SCHOOL, AN ELEEMOSYNARY CORPORATION, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, AN ELEEMOSYNARY CORPORATION, WAH CHAN THOM, WILFRED CHONG AND LEONG NGET CHO,

Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT AND TERRITORY OF HAWAII

BRIEF OF AMERICAN VETERANS COMMITTEE (AVC) Amicus Curiae

PHINEAS INDRITZ,
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December 30, 1948,
Washington, D. C.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT AND TERRITORY OF HAWAII

BRIEF OF AMERICAN VETERANS COMMITTEE (AVC) Amicus Curiae

PRELIMINARY STATEMENT

This case involves the validity of a statute of the Territory of Hawaii which, by prohibiting the voluntary teaching

of any language except English to children, both during and after regular school hours, (1) effectively denies to racial and cultural minorities the opportunity to transmit their language and cultures to succeeding generations and (2) directly impairs the fundamental civil right of all people to be free from governmental prohibition against voluntary academic instruction not harmful or dangerous to the public or to the government.

The American Veterans Committee (AVC) is an organization of veterans of World War II who have associated themselves to promote the democratic objectives for which they fought in that war.[1]

AVC regards this Hawaiian statute as a Pandora's box full of serious and destructive implications for our national unity, our American heritage of personal freedom, our strength as a Nation, and our relations with the other peoples of the world.

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[1] AVC's basic aims are set forth in the Preamble to the AVC Constitution adopted at its First National Convention at Des Moines, Iowa, June 14-16, 1946:

"We as veterans of the Second World War associate ourselves regardless of national origin, creed or color for the following purposes:

"To preserve the Constitution of the United States; to insure the rights of *free speech, free press, free worship, free assembly* and free elections; To provide thorough social and economic security to all; To maintain full production and full employment in our country under a system of private enterprise in which business, labor, agriculture and government cooperate; *To promote peace and good will among all nations and all peoples;* To support active participation of this nation in the United Nations and other world organizations whose purposes are *to improve the cultural, commercial and social relations of all peoples;* To provide such aid to disabled veterans as will enable them to maintain the position in society to which they are entitled; To provide such financial, medical, vocational and educational assistance to all veterans as is necessary for complete readjustment to civilian life; To resist and defeat all attempts to create strife between veterans and non-veterans; *and to foster democracy.* We dedicate ourselves to these aims, and for their attainment we establish this Constitution" (Emphasis supplied).

If this statute is upheld by this Court, its enforcement will create unnecessary resentments and animosities in a substantial number of people of the Territory of Hawaii. Furthermore, the way will have been opened for the enactment of state legislation designed to destroy or impair the continuance of the languages and cultures of many racial and cultural groups which compose the people of the United States. Nor would such repressive statutes be directed only against persons speaking languages derived from continental Europe and Asia. The original Americans—the American Indians—might, except where they are beyond the reach of state law, fall victim to state legislation forbidding them to teach their native languages to their children. Such legislation would inevitably repress the continuance of this Nation's rich heritage of Indian folklore, art and culture, and would be contrary to the established Federal policy, reiterated in international conferences, to promote native Indian languages. See Resolutions V, VI, XXXV and XXXVI, *Final Act of the First Inter-American Conference on Indian Life*, Pátzcuaro, Michoacán, Mexico, April, 1940. Similarly, political subdivisions of the United States having a large proportion of people speaking languages other than English might enact statutes forbidding the teaching of English. Indicative of this possibility are the bills passed in 1945 and 1946 by the Legislature of Puerto Rico requiring the exclusive use of the Spanish language in the public schools.[2] The enact-

[2] The 1945 bill (Sen. bill 26) was vetoed by Governor Tugwell. Acting Governor Perez's veto of the 1946 bill (Senate bill 51) was overridden by the Puerto Rican legislature on April 5, 1946. The bill was then vetoed by President Truman on October 25, 1946. The decision by the San Juan District Court that the President's veto was ineffective, on the ground that it occurred after the 90 days period prescribed in 48 U.S.C., 1946 ed., sec. 825, was reversed on January 28, 1948, by the Supreme Court of Puerto Rico. *Parrilla* v. *Martin, Comisionado*, 68 Decisiones de Puerto Rico 90 (1948).

ment of legislation like this Hawaiian statute would obviously create and deepen the divisions among racial and cultural groups in this country and thus would weaken, not strengthen, our national unity. See *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 641 (1943).

Perhaps even more ominous is the correlation of legislation like this Hawaiian statute and governmental suppression of personal liberties. History has shown that often one of the first steps toward the destruction of individual freedom is the imposition of governmental restraints on the right to learn. This Hawaiian anti-foreign language statute was itself enacted during the period of martial law in Hawaii.[3] And it is more than mere coincidence that the Communists' recent rise to power in Czechoslovakia and in Romania was soon followed by engulfment of the private schools. In Czechoslovakia, all schools were nationalized effective September 1, 1948, under the Czechoslovakian Education Act of April 21, 1948. In Romania, the government decrees of August 2, 1948, closed all foreign schools and took over all confessional schools. The Associated Press release reporting the Romanian decrees significantly stated: "Resistance will be considered sabotage. Russian will be taught from the fifth primary grade upward." *The Washington Post*, p. 1 (Aug. 3, 1948).

The strength of America stems from the interaction of many heterogeneous cultures. Statutes which, like this Hawaiian statute, seek to compel people "to live in a milieu of cultural monism" not only negate the historic foundations of this country but also impair the strength of America. This Hawaiian statute denies to the entire country the opportunity to develop by choosing the best elements of differ-

[3] Presidential Proclamation 2627 of October 19, 1944 (58 Stat. 1158, part 2) terminated martial law in Hawaii effective October 24, 1944; see *Duncan* v. *Kahanamoku*, 327 U. S. 304, 312, n. 5 (1946).

ent cultures. In addition, it weakens the military strength of the nation by preventing loyal citizens from learning skills which the military forces have found to be of inestimable aid in warfare. Thus, American soldiers of Indian descent were used in World Wars I and II to transmit messages in Indian languages which the German and Japanese intelligence officers were unable to decipher, and in World War II the United States Army and Navy received incalculable assistance from Americans of Japanese and Chinese ancestry through their ability to speak Japanese and Chinese (R. 203, 536, 538). In fact, language schools were established by the armed forces to help meet their urgent needs for more persons able to speak Japanese and other languages.[4] Furthermore, such skills are essential to the nation's strength in peacetime as well as in wartime. The State Department is at this moment seeking personnel familiar with foreign languages. *The Washington Post*, p. 1B (Nov. 11, 1948.) "In the new and more inclusive society which is emerging, we shall be living—particularly if it is to be a free and democratic society—in a new intimacy with all the peoples of the world, not only with our allies but with our enemies. . . . We shall need, as never before, to know human geography and, perhaps, geopolitics. We shall need to know—not all of us, but some of us—all the languages." Robert E. Park, "Education and the Cultural Crisis," 48 *American Journal of Sociology*, 728, 735 (May 1943).

The international relations of the United States would also be adversely affected by the animosities which the enforcement of this statute would create among many people of other nations. As Wendell Willkie reminded us, we live in One World—and the deprivation anywhere of such a

[4] Only about 600 persons in this country, aside from those of Japanese ancestry, are familiar with the Japanese language. Carey McWilliams, *Prejudice*, p. 294 (1944). See also R. 536, 538.

basic human right as the right to teach and learn another language arouses resentment everywhere. Illustrative is the deep resentment aroused throughout the world when Germany suppressed the teaching of French in Alsace-Lorraine,[5] Danish in Schleswig, and Polish in Posen, and when the Russian Czar suppressed the Lithuanian language. A more recent illustration is the current breakdown of trade relations between India and the Union of South Africa resulting from the animosities engendered by the racial policies of the South African Nationalist government whose slogan is "One Country, One Flag, One Language." *The New York Times*, p. 13 (Nov. 13, 1947); *Time* Magazine, p. 33 (Oct. 25, 1948). It is obvious that international amity is aided by furthering the capacity to communicate with different peoples and is impaired by efforts such as these to prohibit voluntary language instruction. Mortimer Graves, "The Language Barrier to International Understanding," 250 *Annals of The American Academy of Political and Social Science* 12 (March 1947). The oppression of people because of their language use and instruction has, in fact, been one of the principal causes of war. That is why this nation has by treaty pledged itself to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to . . . language." *Charter of the United Nations*, Articles 55(c), 56 (59 Stat. 1031, 1045-1046). And the elimination of oppression because of language is also one of the goals embodied in the proposed United Nations Declaration of Human Rights. *The Washington Post*, p. 1 (Nov. 27, 1948).

Because of these considerations, AVC views this Hawaiian statute as contrary both to the interests and policy of the United States and to the basic aims of AVC. AVC

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[5] See Alphonse Daudet's well known and heart-rending story of "The Last Lesson" in the French schools in Alsace-Lorraine after the Franco-Prussian War of 1870. *Monday Tales*, p. 1.

therefore files this brief as *amicus curiae* urging this Court to affirm the unanimous decision by the three-judge District Court holding the statute unconstitutional.

THE FACTS AND THE STATUTE

The appellants are officials of the Territory of Hawaii. The appellees are three Hawaiian corporations chartered to teach the Chinese language and three Hawaiian citizens, one a Chinese language teacher and the others parents of several children affected by the statute.[6] About 178 so-called foreign language schools have been established formally in the Territory of Hawaii (R. 450). In these schools children are taught to read, write and speak a language other than English (R. 435). Practically all of these schools teach either the Japanese, Chinese or Korean language (R. 436-437). They are conducted and attended solely by persons of Japanese, Chinese and Korean ancestry, respectively. Their hours of attendance are so arranged as not to interfere with attendance at regular public schools (R. 435). There is no contention in this case that they in any way teach disloyalty to the United States, or that their teaching in any way produces or results in such disloyalty.[7] Nor does this case involve the teaching of general subjects (such as American history, mathematics, geography, etc.) in the medium of a language other than English, or any question as to the power of the Territory to compel the study of English in the regular schools.

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[6] The court below dismissed the complaint as to the parents for lack of jurisdiction on the ground that they failed to show that the matter in controversy exceeds $3,000 (R. 78-79, 110, 113). The parents did not appeal. However, the Territory of Hawaii apparently takes the position in its brief that the court below erred in dismissing the complaint as to the parents on this jurisdictional basis (Appellant's Brief, pp. 30-31).

[7] R. 349. *Cf. Baumgartner* v. *United States*, 322 U. S. 665, 674 (1944); *Gitlow* v. *New York*, 268 U. S. 652 (1925); *Whitney* v. *California*, 274 U. S. 357 (1927).

The appellees instituted this suit in the District Court of the United States for the Territory of Hawaii to enjoin the enforcement of a Hawaiian statute approved on May 1, 1943, by the Governor of Hawaii, entitled: "AN ACT Regulating the Teaching of Foreign Languages to Children." Act 104, Session Laws of Hawaii (1943), pp. 38-40; Revised Laws of Hawaii (1945), ch. 31, secs. 1871-1876, pp. 281-282.

Section 3 of Act 104 provides:

> "No child shall be taught a foreign language in any school unless he . . . (a) . . . shall have passed the fourth grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading . . . attaining a score not lower than normal for his grade; or (b) . . . shall have passed the eighth grade . . .; or (c) . . . shall have attained the age of fifteen years."

Section 2(a) of the act defines the word "school" as meaning

> "any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice."

Section 1 of Act 104 contains the following "declaration of legislative findings":

> "It is hereby declared that the study and persistent use of foreign languages by children of average intelligence in their early and formative years definitely detract from their ability properly to understand and assimilate their normal studies in the English language . . . and definitely retard their progress in . . . such studies . . . cause serious emotional

> disturbances, conflicts and maladjustments; . . . that it is to the best interest, and will best promote the health and welfare, of children of tender age that such foreign language studies not be undertaken until each child shall have completed and passed at least the fourth grade or shall have attained the age of nine [sic] years, unless such child is earlier able to speak, write and read the English language and has attained a test score of at least 5.0 on standard tests in composition and in reading [sic]; and that the teaching and study of foreign language [sic] to and including the eighth grade or the age of fifteen years should be regulated in the public interest to avoid the detrimental results herein set forth . . ."

Pursuant to the agreement of the plaintiffs and defendants in the District Court, a three-judge court was convened under Section 266 of the Judicial Code (28 U. S. C., 1946 ed., Sec. 380) (now 28 U. S. C. Secs. 1253, 2101, 2281 and 2284, Act of June 25, 1948, Public Law 773, 80th Cong.). The three-judge court held (a) that Section 266 of the Judicial Code is applicable to the District Court of the United States for the Territory of Hawaii (R. 87-92), and (b) that Act 104 of the 1943 Hawaiian session laws violates the due process clause of the Fifth Amendment to the United States Constitution. *Mo Hock Ke Lok Po* v. *Stainback*, 74 F. Supp. 852 (D. Haw. 1947) (R. 77-87). One judge dissented on the jurisdictional issue (R. 93-101); but the decision holding the statute unconstitutional was unanimous. The Territorial officials have appealed directly to this Court.

In this brief, AVC as *amicus curiae* will discuss only the unconstitutionality and effect of Act 104 insofar as it forbids the teaching of foreign languages to children.[8]

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[8] *Quaere* whether the prohibition of section 3 against the teaching of "a foreign language" applies to the teaching of the *Hawaiian* language, unless the reference in the statute to the "English language" magically transforms the native language of the Hawaiian Islands into a "foreign language."

ARGUMENT

I. ACT 104 IS UNCONSTITUTIONAL BECAUSE IT UNJUSTIFIABLY INTERFERES WITH VOLUNTARY ACADEMIC INSTRUCTION.

A. Freedom from Governmental Prohibition Against Voluntary Academic Instruction Not Harmful or Dangerous to the Public Is a Fundamental Civil Right Which This Court Has Uniformly Held Is Protected under the Constitution.

Act 104 of the 1943 Hawaiian legislature vitiates four fundamental civil rights:

(1) The right of a child to learn subjects—languages in this case—which are not so harmful or dangerous to the public, to the government, or to himself as to warrant interference with that right.

(2) The right of parents to direct the instruction of their children with respect to such subjects.

(3) The right of a teacher to teach such subjects.

(4) The right of the owner of a school to obtain pupils for such courses.

This Court has repeatedly protected these rights against violation by statutes similar to Act 104 and in doing so has rejected the very same arguments which are here urged by the Territory of Hawaii in attempting to justify Act 104.

Meyer v. *Nebraska*, 262 U. S. 390 (1923);
Bartels v. *Iowa*, 262 U. S. 404 (1923);
Pierce v. *Society of Sisters*, 268 U. S. 510 (1925);
Farrington v. *Tokushige*, 273 U. S. 284 (1927).

The *Meyer* and *Bartels* cases, decided by this Court on the same day, were a group of five cases involving similar statutes enacted, shortly after the First World War, in Iowa,

Nebraska, and Ohio, forbidding the teaching of any language except English in the primary schools. In the *Meyer* case, Meyer was convicted of teaching the reading of the German language in a parochial school to a child 10 years of age who had not passed the eighth grade. The book used was a book of Bible stories. 262 U. S. 390, 397; see also, pp. 22-23, Record in the *Meyer* case, No. 325, U. S. Supreme Court, Oct. Term, 1922. This Court invalidated the statute, holding that a teacher's "right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] Amendment" (262 U. S. 390, 400). This Court rejected the contentions that the statute was justified on the grounds that the use of foreign languages is "injurious to the health, morals or understanding of the ordinary child" (p. 403), "and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled" (p. 401), saying:

> "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means." (p. 401).

In the four cases covered by the *Bartels* opinion, one involved a suit to enjoin the enforcement of one of the anti-foreign language statutes, and the other three arose out of convictions for teaching parochial school pupils how to read German. This Court held all of the statutes unconstitutional on the authority of the *Meyer* decision.

In *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), a Catholic parochial school and a boys' military academy sued to enjoin the enforcement of an Oregon statute compelling attendance at public schools by children between eight and sixteen years of age who had not passed the eighth grade. This Court, relying upon the *Meyer* and *Bartels* decisions, held the statute unconstitutional under the Due Process Clause insofar as it infringed the liberty of parents to direct the education of their children by sending them to private schools and interfered with the right of private schools to secure students for instruction. This Court said:

> "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." (268 U. S. 510, 534).
>
> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." (268 U. S. 510, 535).

Farrington v. *Tokushige*, 273 U. S. 284 (1927), is particularly relevant here since it concerned a statute and school regulations of the Territory of Hawaii whose effect was similar to the statute here involved. In that case a 1920 statute, as amended in 1923 and 1925, purported to regulate all schools "conducted in any language other than the

English language or Hawaiian language, except Sabbath schools." It forbade any instruction in such other languages after September 1923 to children who had not reached the third grade. Regulations issued under the act further forbade those schools to teach any student under 15 years of age or any student who had not completed the eighth grade, unless such student was then attending a public school or an approved private school.[9] This Court, reaffirming its *Meyer*, *Bartels* and *Pierce* decisions, held that Hawaiian legislation of the '20's unconstitutional as an unreasonable restriction upon the schools and the parents' right "of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue." (273 U. S. 284, 298). This Court also said:

> "We of course appreciate the grave problems incident to the large alien population of the Hawaiian Islands. These should be given due weight whenever the validity of any governmental regulation of private school is under consideration; but the limitations of the Constitution must not be transcended." (273 U. S. 284, 299).

Although Justices Holmes and Sutherland dissented in the *Meyer* and *Bartels* cases, they expressly stated that they did so "with hesitation and unwillingness." Furthermore, their dissent was only that a State should be allowed to prohibit the teaching of foreign language *in the schools*

[9] The statute also required a permit and prescribed fees for the schools, forbade anyone to teach in a foreign language school without a permit, prescribed the hours of attendance of pupils, and authorized the Department of Public Instruction to regulate the courses of study, textbooks, and other school matters.

giving regular education to children who are able to hear other languages outside of the regular schools.[10] We submit that the basis underlying their dissent in the *Meyer* and *Bartels* cases is not applicable to Act 104 which effectively forbids the teaching of foreign languages not only *in the regular schools* but also, and more important, *outside of regular school hours*. It is, moreover, particularly noteworthy that Justices Holmes and Sutherland, despite their dissent in the *Meyer* and *Bartels* decisions, later joined in the unanimous opinions announced by this Court in the *Pierce* and *Farrington* cases.

That the right to learn a foreign language is a basic civil right protected by the Constitution was further reinforced by this Court's decision in *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500 (1926), in which this Court invalidated a statute of the Philippine Islands infringing the right to *use* a foreign language.

Under these decisions, the prohibition in the 1943 Hawaiian statute against the teaching of a "foreign language" is, we submit, plainly unconstitutional. Every contention here urged by the Territory of Hawaii in support of the statute was considered and rejected by this Court in those cases, cases which have been repeatedly cited and

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[10] The basis for the Holmes-Sutherland dissent was:

"that in some circumstances, and circumstances existing it is said in Nebraska, the statute might . . . be regarded as a reasonable and necessary method of achieving the desired result [that all United States citizens speak a common language] . . . Youth is the time when familiarity with a *language* is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English *at school* . . . it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried." *Bartels* v. *Iowa*, 262 U. S. 404, 412 (1923). (Emphasis supplied.)

reaffirmed by this Court. See *Prince* v. *Massachusetts*, 321 U. S. 158 (1944). More specifically, this Court expressly considered and rejected the contentions now made by the Territory of Hawaii (Appellant's Brief, pp. 51-55, 70-72) that legislation of this character is justified by the mystic label *parens patriae* or by the argument that the power of the government "to improve the quality of its citizens, physically, mentally and morally" authorizes the prohibition against the teaching of foreign languages to young children "as injurious to the health, morals or understanding of the ordinary child." *Meyer* at pp. 401 and 403; see also *Bartels* at pp. 406-407 and *Pierce* at pp. 524-525.

Indeed, Act 104 goes farther in violating constitutional rights than did the statutes in the *Meyer*, *Bartels* and *Farrington* cases. Those statutes prohibited the teaching of foreign languages *only in schools and during school hours;* but Act 104 prohibits the teaching of foreign languages *both during and after school hours.* Those statutes dealt only with language teaching *by professional teachers at school*; but Act 104 defines "school" so broadly as to prohibit *a father or a mother* from teaching the parental language to his or her two children *at home and after school hours*, either personally, or, as the Territory's attorney pointedly indicated to the court below (R. 137, 144, 145), with the aid of a tutor.

B. Act 104 Is Not Reasonably Calculated to Achieve the Purpose Allegedly Intended by the Hawaiian Legislature:

First, Because It Lacks an Adequate Basis in Fact for Prohibiting the Teaching of Foreign Languages to Children of Average Intelligence; and

Second, Because the Supposed Necessity for Protecting Children of Average Intelligence Does Not Warrant the Denial of Foreign Language Instruction to Children of Above Average Intelligence.

Consequently, Act 104 Lacks a Rational and Substantial Basis to Justify Its Infringement of Fundamental Civil Rights and Is Therefore Invalid.

Act 104 was enacted to meet two supposed evils which the Hawaiian legislature believed to exist in Hawaii. These were that children of average intelligence in Hawaii (1) were below the standards of the mainland in learning English and (2) suffered emotional disturbances and maladjustments injurious to their health as a result of speaking and learning more than one language in their formative years. Although the attorneys for the Territory assert that "The law is based on the premise that bilingual studies by children of tender age are injurious" (Appellant's Brief, p. 61), they attempt to qualify this premise by contending that Act 104, despite its all inclusive language, was not intended to prevent parents from personally teaching a foreign language to their children, but only to prevent formal study in foreign language schools, "such study being what the legislature expressly found to be harmful to children in their early and formative years" (Appellant's Brief, pp. 92, 93-94). But even if we assume, *arguendo*, that this is the correct interpretation of the

legislature's "declaration of legislative findings", the mere assertion by the legislature that the two supposed evils exist, and that attendance at foreign language schools is the cause of these evils, does not foreclose judicial inquiry to ascertain whether the alleged bases for the statute exists. Where, as here, the statute impinges upon fundamental personal rights and liberties which are protected by the Constitution and the exercise of which is vital to the maintenance of democracy, this Court will "weigh the circumstances and . . . appraise the substantiality of the reasons advanced." *Schneider* v. *State*, 308 U. S. 147, 161 (1939); *Thornhill* v. *Alabama*, 310 U. S. 88, 96 (1940). The fact that the reasons advanced by the Legislature have been embodied in a legislative "declaration" does not immunize them from judicial scrutiny. *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 547 (1924); *Charles Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 536 (1923); *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209-210 (1934).

The court below, because it held Act 104 unconstitutional on other grounds, made no findings that all children of average intelligence speaking and learning more than one language thereby suffered emotional disturbance and maladjustment injurious to their health or thereby fell below the mainland standards in learning English. But these are the supposed facts upon which the constitutionality of the statute rests. Since the presumption of constitutionality gives little aid to statutes which impinge on fundamental personal human liberties guaranteed by the Constitution, the present record lacks adequate basis for assuming the validity of the statute in the absence of judicial findings confirming the existence of the facts upon which the statute rests. This Court, therefore, could not, in any event, uphold the validity of Act 104 in the absence of such findings.

Nashville, C. & St. L. Ry. v. *Walters*, 294 U. S. 405, 433 (1935).

Even if these evils of emotional maladjustment and English deficiency exist, it does not follow that these evils are caused by attendance at foreign language schools. The witnesses for the Territory of Hawaii were unable to point to any recorded cases of neuroses arising from language study by children in Hawaii (R. 331, 377, 418). Furthermore, the fact is that the study of foreign languages by children in Hawaii tends to *prevent* emotional maladjustment. Many children in Hawaii have parents who speak more fluently in languages other than English. In such cases the child's opportunity to learn, outside of regular school hours in which no such instruction is given, a language other than English serves to bridge the gap between the child and its parents (R. 169, 185-186, 220, 261, 301, 305, 314, 330, 379-383, 444). The language schools thus serve "as stabilizing factors because of the service they rendered youth that were in danger of losing the social benefits of home and family influence before they had sufficiently accepted the customs and institutions of the American community in which they were growing up." Hearings on H. R. 3034, *Statehood for Hawaii*, Subcomm. of House Comm. on Territories, 74th Cong., 1st sess., pp. 83-84 (Oct. 7-18, 1935) (R. 557-558). Obviously, such children more probably would suffer "serious emotional disturbances, conflicts and maladjustments" where the government prevents their learning the language of their parents than they would incur by attendance at a foreign language school. It is cultural conflict, not bilingualism as such, which is largely responsible for any emotional maladjustment in bilingual children. *46th Yearbook, National Society for the Study of Education*, Part II, "Early Childhood Education," p. 209 (1947). This was acknowledged by the Territory's witnesses

in this case (R. 304-305, 379). Even the counsel for the Territory of Hawaii would not claim that the concurrent use and teaching in Switzerland of *four* national languages (German, French, Italian, Romansh) has transformed the Swiss into a nation of neurotics. 21 *Encyclopaedia Britannica*, p. 677 "Switzerland" (1947); Robert C. Brooks, *Civic Training in Switzerland*, 184-185, 298-299 (1930).

Morever, on the precise issue whether attendance at foreign language schools retards children in Hawaii in the learning of English there have been only two scientific studies. Both of these have demonstrated that such attendance has practically no retardative effect and that any retardation in their learning of English is primarily due to the use, outside of the schools, of *pidgin-English*, a polyglot jargon of English words mixed with phrases of Hawaiian, Chinese, Portuguese, Malayan, and other languages.[11] The testimony by some of the Territory's witnesses that foreign language studies retard children in the study of English (summarized in Appellant's Brief, pp. 63-68) consists almost entirely of statements of opinion and supposition. Several of the Territory's witnesses, furthermore, admitted on cross-examination that the prime factor tending to retard children in the mastery of English in Hawaii is the use of pidgin-English (R. 254-255, 259, 269, 270, 353, 356, 357). The enforcement of Act 104 would therefore have little, if any, effect in aiding the children to increase their mastery

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[11] R. 213, 215-218, 227, 254-255, 259; Percival M. Symonds, "The Effect of Attendance at Chinese Schools on Ability with the English Language [in Hawaii]" 8 *Journ. of Applied Psych.* 411 (Dec. 1924) (R. 507, 513, 516); Henry B. Schwartz, "A Study of the Effect of Attendance at Language Schools Upon Success in McKinley High School [in Hawaii]" 14 *Hawaii Educational Review* 30 (Oct. 1925); Hearings, *Statehood for Hawaii*, Joint Comm. on Hawaii, 75th Cong., 2nd sess., pp. 329-330 (Oct. 6-22, 1937) (R. 547-548); Hearings, *Statehood for Hawaii*, on H. R. 3034, Subcomm. of House Comm. on Territories, 74th Cong., 1st sess., pp. 81-84 Oct. 7-18, 1935 (R. 555-558).

of English. But it would practically destroy the rights of the children, their parents, the teachers and the owners of the schools to participate in voluntary instruction of subjects not harmful or dangerous to the children or to the public or to the government. The evil which the legislature sought to correct should more properly be met by improving the techniques of teaching English in the regular public, private and parochial schools, not by stifling the voluntary teaching of other languages outside of school hours.

Furthermore, even if it be true, as asserted by the Territorial legislature in its "declaration of legislative findings", that the prohibition against foreign language instruction is necessary to aid children of *average* intelligence or below to learn English well, it does not justify this statute. Under this statute, not only the children of *average* intelligence and below, but also children of *above average* intelligence are deprived of the opportunity to learn a foreign language and thus broaden their education. Act 104 is not like a statute requiring the learning of English, which admittedly promotes the public welfare. Act 104 is a statute which closes the door of knowledge in other languages to all children under 15, irrespective of their level of intelligence, who are in the first four grades or who have dropped out of school before completing the 8th grade, and to all school children under 15 who, fortunate enough to have passed the 4th grade, have the double misfortune of not having yet passed the 8th grade and of having received a grade "lower than normal for his grade" in "a standard test in English." Children are generally at least 10 years old before they have passed the 4th grade. But, as Justice Holmes so incisively said: "Youth is the time when familiarity with a language is established . . ." (ftnt. 10, *supra*). For the many children in Hawaii who begin to sup-

port themselves in their early 'teens, it is their only time to learn a foreign language (R. 289, 360, 361, 467-468, 480, 492). Act 104 thus limits, rather than promotes, the field of human knowledge. It is, in truth, a statute to encourage ignorance. Compare *Scopes* v. *State*, 154 Tenn. 105, 289 S. W. 363 (1927) (Tennessee statute forbidding the teaching of evolution in schools). As the court below made clear, Act 104 constitutes an unreasonable discrimination with respect to half of the children covered by the statute. Even if the Territory is correct in its strained construction of the word "average", *i.e.*, that the Legislature found the prohibition against foreign language instruction necessary to aid all but exceptionally brilliant children to learn English (Appellant's Brief, pp. 80-89), there still is no justification for the discrimination against the latter's right to learn a foreign language. Accordingly, the statute must fall; the legislature has the duty of drafting a statute directed precisely at evils it may constitutionally prevent. See, *e. g.*, *Winters* v. *New York*, 333 U. S. 507 (1948).

Act 104 is therefore invalid because it lacks an adequate, substantial and rational basis in fact for the prohibition it imposes on fundamental civil rights, *Minnesota* v. *Barber*, 136 U. S. 313, 320 (1890); *Nectow* v. *Cambridge*, 277 U. S. 183 (1928); *Jacobson* v. *Massachusetts*, 197 U. S. 11, 31 (1905); *Booth* v. *Illinois*, 184 U. S. 425, 429 (1902); and because it is not "narrowly drawn to cover the precise situation" that would call for remedial action if the supposed evils and the cause thereof were as stated by the legislature. *Thornhill* v. *Alabama*, 310 U. S. 88, 105 (1940); *Cantwell* v. *Connecticut*, 310 U. S. 296, 311 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116 (1943).

II. THE PURPOSEFUL DISCRIMINATION AGAINST CULTURAL AND RACIAL MINORITIES WHICH UNDERLIES THIS STATUTE RENDERS IT UNCONSTITUTIONAL.

Statutes forbidding the teaching or use of foreign languages are largely motivated by prejudice against particular minorities in the community. See *Bartels* v. *Iowa*, 262 U. S. 404, 413 (1923); *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 528 (1926). Although the Hawaiian legislature, in its "declaration of legislative findings", sought to justify Act 104 as an attempt to help children of average intelligence to learn English, the legislative history of Act 104 plainly indicates that it was directed especially against the Japanese, Chinese and Korean speaking residents of Hawaii. H. Journ., p. 916, and S. Journ., pp. 363-364, 22nd Legislature of Hawaii (1943). It was hysteria, antagonism and prejudice against those of Oriental descent which largely influenced the anti-foreign language statutes in Hawaii. See Hearings on H. R. 3034, Statehood for Hawaii, Subcomm. of House Comm. on Territories, 74th Cong., 1st sess., p. 82 (Oct. 7-18, 1935) (R. 556); Plaintiff's Exh. G. (R. 551). The fact that Act 104 was directed against "discrete and insular" cultural minorities at the very least weakens the general presumption of its constitutionality. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938); see also *Thomas* v. *Collins*, 323 U. S. 516, 529-530 (1945); *United States* v. *C. I. O.*, 335 U. S. 106, 140 (1948) (concurring opinion of Justices Rutledge, Black, Douglas and Murphy). And where, as here, the statute is also purposefully aimed at particular racial groups, its invalidity becomes manifest. This Court has consistently affirmed that under our Constitution governmental restrictions aimed at particular racial groups "in the eye of the law is not justified." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886); *Yu Cong Eng* v. *Trini-*

dad, 271 U. S. 500, 525-527 (1926); *Smith* v. *Texas*, 311 U. S. 128, 130 (1940); *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192, 203, 208 (1944). And there is here entirely absent any "pressing public necessity" or "compelling justification" which it has been said "may sometimes justify" restricting the civil rights of racial groups. *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Oyama* v. *California*, 332 U. S. 633, 640 (1948). It is immaterial whether this Constitutional protection against the Territorial government's manifestation of racial hostility is ascribed to the Due Process Clause of the Fifth Amendment, as implied in *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943) and *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944), or to the established public policy of the United States which forbids any branch of the Federal or territorial governments to do what the Equal Protection Clause of the Fourteenth Amendment would, if this statute had been enacted by a State, clearly deny to a State government. *Hurd* v. *Hodge*, 334 U. S. 24, 35-36 (1948); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

III. ACT 104 NECESSARILY INFRINGES ON THE FREEDOMS OF RELIGION AND OF THOUGHT, WITHOUT JUSTIFICATION BY ANY CLEAR AND PRESENT DANGER TO INTERESTS WHICH THE TERRITORY MAY LAWFULLY PROTECT, AND IS THEREFORE INVALID UNDER THE FIRST AMENDMENT.

The exercise of religion is, among many religious groups, intimately linked with languages other than English. For example, Latin is used in the Catholic mass; Orthodox Jewish prayers are in Hebrew; worship in the Greek Orthodox Church and the Russian Orthodox Church uses the Greek language. The language imparts a vitality, religious significance and accuracy to the prayers and

catechisms which is lacking in an English translation. To the Chinese child the religious nuances and impact of the teachings of Confucius may be immeasurably greater when learned in Chinese. *Cf.* Louis Wirth, "Education for Survival: The Jews," 48 *American Journal of Sociology* 682, 686, 688-689 (May 1943).

Under Act 104, however, a Catholic priest is prohibited from teaching the mass in Latin to many Catholic children under 15 (R. 401); an orthodox Jewish Rabbi is forbidden to instruct many Jewish children in their Hebrew prayers; and, as in this case, children of Chinese descent are prevented from obtaining religious instruction in the language of Confucius. Perhaps the Territorial legislature may not have intended this result. But if it "has made a choice of language which fairly brings a given situation within the statute, it is unimportant that the particular application may not have been contemplated by the legislators." *Barr* v. *United States*, 324 U. S. 83, 90 (1945).

Furthermore, Act 104 inevitably stifles freedom of thought, expression and learning, since there is a close bond between ability to learn and express one's self in a particular language, and freedom of thought as we conceive it. "Language is the dress of thought."

This Court has held that the great and preferred freedoms of religion and of thought "are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 633, 639 (1943). But no one could contend that a "grave and immediate danger" to the Territory of Hawaii or its government results from voluntary instruction in languages other than English. Nor is there any "grave and immediate danger" to the children themselves, for whose emotional stability the Territory is so solicitous. See Point IB above. Furthermore, the rights which the

teachers, parents and children here assert do "not interfere with or deny rights of others" and hence there is even less justification for governmental interference with their rights. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 630 (1943).

The restriction of religious freedom which results from this statute is not a minor incident to a statute of general applicability which promotes the welfare of the people such as was present in *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905) (compulsory vaccination); *Hamilton* v. *Regents*, 293 U. S. 245 (1934) (military training); *Shapiro* v. *Lyle*, 30 F. (2d) 971 (D. C., W. D. Wash. N. D. 1929) (regulation of alcoholic liquor); *Davis* v. *Beason*, 133 U. S. 333, 342 (1890) and *Mormon Church* v. *United States*, 136 U. S. 1, 49-50 (1890) (prohibition of polygamy); and *Prince* v. *Massachusetts*, 321 U. S. 158 (1944) (child labor laws). In the latter case, a statute forbidding minors to sell newspapers, periodicals or merchandise on the streets was held valid as applied to children selling religious periodicals at night on the streets. That statute did not impair the child's freedom to exercise his religion in any other place or by any other means except through the sale of periodicals on the streets, and this minor restriction upon the claim to absolute religious freedom was deemed valid in order to accommodate the admitted power of the state to regulate child labor.

But when Act 104 is "tested by its operation and effect," *Near* v. *Minnesota*, 283 U. S. 697, 708 (1931), it is plain that the statute goes beyond an accommodation between religious freedom and the Territory's interest in having its citizens speak a common language. Act 104 absolutely prohibits the teaching of religion in a foreign language to many children under fifteen. This is not a minor restriction to accomplish a legitimate and general objective within the power of the government. It is a

major and unjustified impairment of religion for those whose religious views are expressed in languages other than English. If a state's interest in promoting patriotism by compelling children to salute the flag is not sufficiently weighty to warrant a restriction upon freedom of religion, as was held in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943),[12] then the Territory's interest in having all its citizens speak a common language is not sufficiently weighty to restrict the religious training of children by forbidding them to learn the language through which their religion is expressed. This is so even if it be assumed that the Territory could compel its citizens to crystallize into a uniform language mold in situations where religion is not intertwined with language. And it is particularly true since the Territory could, by improving its teaching of English in the regular schools, more easily and properly promote its interest in having its citizens speak a common tongue. This ability of the Territory thus to achieve its legitimate interest by means which do not impinge on the exercise of religion prevents the Territory from having any valid objection to the invalidation of the statute. *Minersville School District* v. *Gobitis*, 310 U. S. 586, 603-604 (1940); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 631 (1943). Furthermore, the Territory's interest in a common tongue, like its interest in promoting patriotism through the compulsory flag salute, is not as weighty as its interest in regulating child labor or requiring vaccination against disease. The impact of Act 104 on religion thus cannot be justified as a minor restriction incident to general legislation promoting the public welfare. It is a direct and major infringement of religious liberty and

[12] See also *Taylor* v. *Mississippi*, 319 U. S. 583 (1943) holding that a State may not punish the *teaching* of resistance to governmental compulsion to salute the flag.

falls under the ban of the First Amendment to the Constitution.

CONCLUSION.

We believe that Act 104 violates the First and Fifth Amendments to the Constitution and that the three-judge district court correctly held Act 104 to be invalid. We also believe that this act is inconsistent with the public policy of the United States. We therefore respectfully urge this Court to affirm the judgment of the three-judge district court.

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DECEMBER 30, 1948.
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Supreme Court of the United States

OCTOBER TERM, 1948

INGRAHAM A. STAINBACK, ET AL.,
Petitioners,
against
MO HOCK KE LOK PO, ET AL.

No. 52

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.
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Supreme Court of the United States

OCTOBER TERM, 1948

INGRAHAM A. STAINBACK, *et al.*,
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against

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No. 52.

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

This brief is submitted in support of the position of respondents herein with the consent of the parties. The American Civil Liberties Union is a non-partisan, non-profit organization devoted to the protection and furtherance of civil liberties. It has no affiliation of any kind with any of the parties to this action and is interested in this case solely because it believes that it presents far reaching problems in the field of academic freedom which has for many years been among the prime concerns of the American Civil Liberties Union.

Argument

The facts herein are adequately stated in the briefs of the parties hereto and need not be repeated except to state that the action involves the constitutionality of Chapter 31 of the Hawaiian Revised Laws. That legislation forbids any Hawaiian child to be taught a foreign

language in any school unless he shall either have passed the first four grades of a public or private school and shall thereafter in each succeeding grade attain a certain score in "a standard test in English composition and reading", or he shall have passed the eighth grade, or he shall have attained the age of fifteen years (Hawaiian Rev. Law, Section 1873). This brief is concerned only with the constitutionality of the aforesaid statute and not with any of the other procedural or jurisdictional points which may be raised upon this appeal.

The respondent educational institutions have standing to assert the unconstitutionality of the statute since it impairs respondents' property right to render educational services. *Meyer* v. *Nebraska*, 262 U. S. 390; *Bartels* v. *Iowa*, 262 U. S. 404. The standing which thus accrues to respondents authorizes them to urge not only the right to maintain a foreign language educational institution, but also whatever constitutional rights parents may have to send their children to respondents' schools. *Pierce* v. *Society of Sisters*, 262 U. S. 390; cf. *Truax* v. *Raich*, 239 U. S. 33; *Truax* v. *Corrigan*, 257 U. S. 312; *Buchanan* v. *Warley*, 245 U. S. 60.

The "right thus to teach and the right of parents to engage [for the instruction of] their children, we think, are within the liberty of the [Fourteenth] Amendment." *Pierce* v. *Society of Sisters*, 262 U. S. 390, 400. "The Fourteenth Amendment, as now applied to the States,* protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discre-

* The liberties guaranteed by the Fourteenth Amendment are here preserved under the Fifth Amendment from encroachments by territories of the United States or subdivisions thereof. *Farrington* v. *Tokushige*, 273 U. S. 284.

tionary functions, but none that they may not perform within the limits of the Bill of Rights." *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 637. Accordingly, the statute here in issue is to be tested by the standards applicable to any legislation restrictive of civil liberties. Upon a weighing of the "circumstances" and an appraisal of "the substantiality of the reasons advanced" in support of the statute (*Schneider* v. *New Jersey*, 308 U. S. 147, 161; *Thornhill* v. *Alabama*, 310 U. S. 88, 95), the legislation must be held unconstitutional as determined by the District Court of Hawaii (*Mo Hock Ke Lok Po* v. *Stainback*, 74 F. Supp. 852).

Schooling of children in a private foreign language school after regular school hours involves no threat to the public safety or welfare. The subject matter taught and learnt at such a school contains no dangerous doctrine. It is the peaceable material which may be found in any regular elementary school curriculum. Nor does it appear that the statute's scope is dependent upon the competency of the instruction at the affected schools. The single justification for the statutory abridgment of the right of respondents to teach and the right of students to learn foreign languages as well as the right of parents to choose the instruction to be accorded their children is the purported effect upon pupils resulting from the study of foreign languages after regular school hours.

In *Meyer* v. *Nebraska, supra*, this Court held unconstitutional a Nebraska statute which forbid foreign language teaching to students who had not passed the eighth grade. The purpose of the statute there was "to promote civic development by inhibiting training and education of the immature in foreign languages and ideals before they could learn English and acquire American ideals", *Meyer* v. *Nebraska, supra*, at p. 401. In the case at bar a similar

statute is involved, but this time the stated purport of the law is to aid school children of average intelligence in their English language studies; and to avert "serious emotional disturbances, conflicts and maladjustments." Hawaiian Rev. Law, §1871.

It is submitted that the justification for the impairment of civil rights is constitutionally insufficient here as it was in *Meyer* v. *Nebraska*. If instruction in a foreign language after regular school hours is "emotionally disturbing" to children of average intelligence, such disturbance must be evaluated with regard for the basic social and constitutional premise that the rearing of children in our society is left to parents and not to the state. Certain minimum standards of education and child care may be and are prescribed by the public authorities (see *Meyer* v. *Nebraska*, *supra*, at p. 402), but beyond those minima state paternalism is not the rule. Consequently, although the pedagogical problem which concerned the Hawaiian legislature may be conceded to exist, that problem must be resolved by legislation which affirmatively improves the teaching and reception of the English language rather than by legislation which circumscribes another body of cultural endeavor. This conclusion is impelled not only by the constitutional right to teach and to learn subjects which are innocuous to society, and the constitutional right of parents to send their children to educational institutions chosen by those parents, but by the further obvious circumstance that if "emotional disturbances" of the nature here involved could bottom restrictions upon parents' government of the education of their children, then very grave threats would ensue to the instruction of children in unorthodox religious, social and political doctrines which must frequently cause "serious emotional disturbances, conflicts and maladjustments." It does not require ex-

tended argument to establish that, if, legislation of the character under consideration were permitted to exist, in vast areas of this country the teaching of biology, the theory of evolution, indeed the truths of the equality of man and in many instances the basic tenets upon which this nation was founded, could be eliminated from the body of permissible education upon legislative findings that to teach these beliefs would make for "emotional disturbances," or similar vague and indefinable consequences to persons of such age as the legislature might "reasonably" determine.

In any event, to the extent that the justification proffered for the legislation is constitutionally sufficient, the legislation cannot exceed its justification. *Thornhill* v. *Alabama*, 310 U. S. 88, 99. Thus, the statutory scheme is predicated upon the effect of afternoon foreign language instruction upon children of average intelligence, yet the scope of the statute encompasses all Hawaiian children. Legislation impairing civil liberties must, on its face, be confined to the cause for that legislation. *Thornhill* v. *Alabama*, *supra*; *Thomas* v. *Collins*, 323 U. S. 516; *Lovell* v. *Griffin*, 303 U. S. 444. The statute would forbid students of above-average intelligence from obtaining foreign language instruction which might benefit rather than retard them. Such a loosely drawn statute is an unnecessary and an unconstitutional impairment of the right of parents freely to choose the educational institution to which they will send their children.

CONCLUSION

The judgment should be affirmed and Chapter 31 of the Hawaiian Revised Laws held to be unconstitutional.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
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Supreme Court of the United States

OCTOBER TERM, 1948

No. 52

INGRAM M. STAINBACK, Governor of the Territory of Hawaii, WALTER D. ACKERMAN, JR., Attorney General of the Territory of Hawaii, and W. H. LOPER, Superintendent of Public Instruction of the Territory of Hawaii,

Appellants,

vs.

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII

BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

WILLIAM MASLOW,
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Supreme Court of the United States

OCTOBER TERM, 1948

No. 52

INGRAM M. STAINBACK, Governor of the Territory of Hawaii, WALTER D. ACKERMAN, JR., Attorney General of the Territory of Hawaii, and W. H. LOPER, Superintendent of Public Instruction of the Territory of Hawaii,

Appellants,

vs.

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII

BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

Interest of the American Jewish Congress

The American Jewish Congress was organized " . . . to help secure and maintain equality of opportunity . . . and to safeguard the civil, political, economic and religious rights of Jews everywhere" and ". . . to help preserve, maintain and extend the democratic way of life." Con-

sistent with these purposes we have, within the past year, joined in the submission of a brief amicus curiae to this Court in *People ex rel. McCollum* v. *Board of Education*[1] in which we argued the constitutional invalidity of religious teaching in the public schools. We there urged that political liberty and religious freedom could remain inviolate only when there was no intrusion of secular authority in religious affairs or of religious authority in secular affairs. The continued separation of church and state, we argued, was an indispensable requisite of religious liberty as envisaged by the framers of the First Amendment.

In the *McCollum* case, the guaranty of religious freedom was being challenged by the extension of state aid to religious teaching through the use of the public school system and facilities for religious instruction. The case now before this Court presents another attack on religious freedom, namely that of state interference with religious instruction. That attack we regard as equally unconstitutional. For, the Constitution which prohibits state aid to religious teaching prohibits as well state interference with such teaching.[2]

In our brief in the *McCollum* case we stressed the sacred responsibility which has always been attached to religious instruction in Jewish history and tradition.[3] The over-

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[1] Brief of Synagogue Council of America and National Community Relations Advisory Council in *People of the State of Illinois ex rel. Vashti McCollum* v. *Board of Education, Champaign, Ill.*, October Term 1947, No. 90.

[2] We pointed out in our brief in the *McCollum* case that some of the teaching in Christian religious classes, particularly those of Jewish participation in the crucifixion, had a particularly harmful effect upon inter-religious relationships. Nevertheless, we argued that the state has no constitutional authority to exercise control over the content of religious instruction in church schools conducted independently of the public school system. We stated that the friction and disharmony resulting from such instruction is part of the price we willingly pay for religious liberty. *Ibid.* pp. 4-5.

[3] *Ibid.* p. 5.

whelming majority of Jewish children receive religious instruction in after-hour or Sunday schools.[4] Since promotion of religious education is one of the important aspects of our organizational activity, we have consistently striven for the extension of these programs to include those at present not receiving such education. The statute before the Court in this case would make it illegal for these religious schools to teach the Bible to children in the original Hebrew tongue.[5] We would, therefore, be remiss in our duty of fostering religious instruction if we did not present to this Court our view that the statute constitutes a grave attack upon religious liberty.

Our interest in this case, however, is not limited to the challenge to religious liberty it presents, grave as that challenge is. Even if the present statute exempted religious schools, we should nevertheless contest its validity because we believe it to be utterly inconsistent both with the fundamental principles and the constitutional concepts of our American democracy. The Hawaiian legislature which enacted this statute was not motivated by any anti-religious considerations. It sought, as has repeatedly and futilely been attempted elsewhere, to achieve a monolithic cultural uniformity by governmental compulsion. The richness and promise of American culture lies in its diversity.[6] The glory of the American contribution to civilization has been the manner in which it has welcomed the heritages of many

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[4] At least three out of every four Jewish children in the United States receive religious education at some time during their childhood. Jewish Education Association of New York, *Twenty-Five Years of Jewish Education in the United States*, American Year Book (1936-1937) 104; Hurwich, *Religious Education and the Release Time Plan*, Jewish Education (1941) 103-107.

[5] Unlike the similarly motivated statute invalidated in *Farrington v. Tokushige*, 273 U. S. 284 (1927), the present statute does not exempt "Sabbath schools."

[6] Adamic, *A Nation of Nations*, 6-13; Kallen, *Culture and Democracy in the United States*, p. 61; Cole and Vickery, *Intercultural Education in American Schools*, p. 50; Brown and Roucek, *One America*, p. 501 *et seq.*

lands, peoples and traditions and blended them, in all their diversities, into the multi-faceted pattern of American culture, rather than destroying them by imprisonment in the strait-jacket of a monolithic nationalism. Any attempt to impose a rigid cultural uniformity by thwarting the development of the various cultural traditions out of which the American pattern has been woven violates and is alien to the basic principles of American democracy. We would oppose all such attempts, no matter what particular means might be used to achieve that un-American end. If purely voluntary means are employed, the ideals of American democracy are being subverted. When the goal is sought through compulsion, as in the case now before this Court, constitutional rights are infringed as well. Forced conformity to the cultural patterns of the majority ethnic group is an integral part of the fascist or totalitarian process[7] and it is successfully achieved only in the graveyard.[8]

Attempts to outlaw foreign language teaching seem to rest on the assumption that there is some necessary relationship between language and the ideals or concepts that language conveys. Yet, every student of American history knows that most demagogues who have attempted, both in speech and in writing, to destroy American democracy and to sow the seeds of discord and race hatred, have used the English language faultlessly and frequently eloquently; while many of the noblest utterances ever made in this country, most expressive of its democratic ideals and aspirations, have been spoken or written in languages other than English or in imperfect English.

For these reasons and with the consent of the parties we respectfully submit this brief amicus curiae.

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[7] MacIver, *The More Perfect Union*, p. 9.

[8] *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 641 (1943).

Statement of the Case

This appeal is brought by the Governor, Attorney-General and Superintendent of Public Instruction of the Territory of Hawaii from a judgment entered in the District Court of the United States for the District of Hawaii on February 13th, 1948 (R. 591). The appellees, eleemosynary corporations organized for the sole purpose of conducting schools in Hawaii for the education of children in the Chinese language (R. 4), brought suit against appellants for judgment declaring the invalidity and enjoining enforcement of a Territorial statute, more fully described below, regulating and restricting instruction of children in any foreign language (R. 10-11).[9] After trial, the District Court unanimously[10] adjudged that the statute violated the due process clause of the Fifth Amendment and ordered the issuance of the injunction prayed for (R. 87).

The Statute

The statute[11] attacked in this suit was enacted on May 1, 1943. It declares, as a legislative finding, that:

". . . the study and persistent use of foreign languages by children of average intelligence in their

[9] Two parents of children in the Hawaiian public schools joined in the suit, but failed to allege that they possessed an interest in the matter in controversy exceeding $3,000. The District Court, *sua sponte*, ruled that such an allegation was required by 28 U. S. C. 41 (1) (1946 ed.), and that 28 U. S. C. 41 (14) (1946 ed.), which does not require allegation of the jurisdictional amount in suits to redress deprivation of civil rights under color of any law "of any *State*" does not apply to Territories. The Court accordingly dismissed the complaint as to these plaintiffs. R. 78-79.

[10] One of the judges dissented as to the applicability of the three judge procedure prescribed in Section 266 of the Judicial Code (28 U. S. C. 380), but nevertheless participated in the determination on the merits.

[11] Act 104 of the Hawaiian Legislature, now embodied in Hawaiian Rev. Law, 1945, Chapter 31. The text of the statute is set forth in the Transcript of Record at pp. 11-14.

early and formative years definitely detract from their ability properly to understand and assimilate their normal studies in the English language, which are required by law to be pursued by all children of school age, and definitely retard their progress in understanding and assimilating such studies; that the study and persistent use of such foreign languages in such early and formative years may and do, in many cases, cause serious emotional disturbances, conflicts and maladjustments; that the teaching of foreign languages compels and encourages the study and persistent use of such foreign languages, to the detriment, as aforesaid, of children in their early and formative years; that it is to the best interest, and will best promote the health and welfare, of children of tender age that such foreign language studies not be undertaken until each child shall have completed and passed at least the fourth grade or shall have attained the age of nine years, unless such child is earlier able to speak, write and read the English language and has attained a test score of at least 5.0 on standard tests in composition and in reading; and that the teaching and study of foreign language to and including the eighth grade or the age of fifteen years should be regulated in the public interest to avoid the detrimental results herein set forth to which end each of the provisions of this chapter are enacted" (Section 1).

It defines a "school" as:

"'School' means any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice" (Section 2).

The statute then provides:

"No child shall be taught a foreign language in any school unless he shall comply with one of the following requirements: (a) That he shall have passed the fourth

grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the department of public instruction attaining a score not lower than normal for his grade; or (b) that he shall have passed the eighth grade in public school or its equivalent; or (c) that he shall have attained the age of fifteen years" (Section 3).

Since most Hawaiian children enter the first grade when they reach the age of six, the Court below construed this section as in effect prohibiting the teaching of a foreign language to children under ten (R. 79). The statute also prohibits any school from permitting the teaching of any foreign language to any child under fifteen by a teacher not previously examined and certified by a board to "be well versed in the usage and idiom of both the English language and the foreign language to be taught" (Section 4). It provides for visitation by the department of public instruction (Section 5) and for injunctive enforcement of its provisions (Section 6).

The Issue

The issue to which this brief is addressed is whether the challenged Hawaiian statute unconstitutionally abridges freedom of religion. This issue turns upon whether the statute in fact restricts religious liberty and, if it does, whether the restriction is necessary to prevent grave and immediate danger to interests which the territorial legislature may lawfully protect.

The Court below invalidated the statute on the ground that it violated the due process clause of the Fifth Amendment (R. 87) without mentioning the First Amendment. In this the Court apparently followed *Farrington* v.

Tokushige.[12] It may have felt constrained to do this by reason of the fact that the plaintiffs did not in their complaint refer specifically to the First Amendment. Since the Court recognized the existence of a religious liberty issue,[13] we believe that it could well have expressly decided that issue. Nor is it material that the Court found it necessary to dismiss the complaint in respect to the parent plaintiffs; the preacher and teacher of religion, no less than the disciple, is protected by the First Amendment,[14] and

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[12] 273 U. S. 284, 289 (1927). It should be noted, however, that the statute in the *Farrington* case expressly exempted "Sabbath schools" (p. 291), whereas no such exemption is contained in the statute involved in the instant case. Moreover, the *Farrington* case followed *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), and *Bartels* v. *Iowa*, 262 U. S. 404 (1923), both decided under the Fourteenth Amendment at a time when it was not fully realized that the religious liberty guaranty of the First Amendment was impliedly incorporated in the Fourteenth. Cf. *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530 (1922); as a result, this Court was unfortunately required to invalidate a statute prohibiting parochial schools on the ground that the conduct of such schools is a business and property entitled to constitutional protection against deprivation without due process of law. *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925).

[13] "Assuming this true, it [the statute] would apply to a religious Chinese descended mother having an educated cousin teach two of her children in her home the truths of Confucius, even orally, explaining the words of that spiritual guide in the language in which they are spoken and are recorded" (R. 80). "There are many Hawaiian Catholic parochial schools with complete educational courses, attendance in which is equivalent to that of the regular public schools" (R. 85).

[14] *Taylor* v. *Mississippi*, 319 U. S. 583 (1943); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Schneider* v. *New Jersey*, 308 U. S. 147 (1939); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Marsh* v. *Alabama*, 326 U. S. 501 (1946). Cf. Virginia Statute of Religious Liberty (XII Henning, Statutes of Virginia, 84): "Be it enacted by the General Assembly, that . . . all men shall be free to profess and by argument to maintain, their opinion in matters of religion. . . ." Cf. also Mr. Justice Harlan's dissenting opinion in *Berea College* v. *Kentucky*, 211 U. S. 45, 67 (1908): "The capacity to impart instruction to others is given by the Almighty for beneficial purposes and its use may not be forbidden or interfered with by government—certainly not unless such instruction is, in its nature, harmful to the public morals or imperils the public safety."

the decision could therefore have been based on the religious liberty guaranty even though the only remaining plaintiffs were schools. Probably omission of reference to the First Amendment can be explained in part by the Court's determination that plaintiffs were required to prove that the matter in controversy exceeds $3,000, and by the difficulty of translating interference with the exercise of religious liberty into monetary values.

Whatever the reason for the omission of reference to the First Amendment, we submit that the issue of religious liberty is an integral and inseparable part of the determination of the Court below and of the issue before the Court. There can be little doubt of the legislature's power to regulate business enterprises,[15] even educational business enterprises.[16] Constitutional limitations are transgressed only when the legislature's action is arbitrary or unreasonable.[17] In determining whether the Hawaiian statute is arbitrary and unreasonable, this Court must consider whether it prohibits the free exercise of religion in violation of the First Amendment. It is now well established that legislation which prohibits the free exercise of religion effects a deprivation without due process of law in violation of the Fourteenth Amendment.[18] It is no less a deprivation under the Fifth.[19] We submit that if the Hawaiian statute is vulnerable to direct attack under the First Amendment, it cannot be sustained under the Fifth.

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[15] *North American Co.* v. *S. E. C.*, 327 U. S. 686 (1946); *Mulford* v. *Smith*, 307 U. S. 38 (1939); *Currin* v. *Wallace*, 306 U. S. 1 (1939).

[16] *Zucht* v. *King*, 260 U. S. 174 (1922); *People* v. *Am. Socialist Soc.*, 202 N. Y. App. Div. 640 (1922).

[17] See note 15 *supra*. See also *Farrington* v. *Tokushige*, 273 U. S. 284 (1927); *Meyer* v. *Nebraska*, 262 U. S. 390, 403 (1923).

[18] *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Marsh* v. *Alabama*, 326 U. S. 501 (1946).

[19] Cf. *United States* v. *Korner*, 56 F. Supp. 242 (1944).

This, in essence, was the theory upon which *Meyer* v. *Nebraska*,[20] *Bartels* v. *Iowa*,[21] and *Pierce* v. *Society of Sisters*[22] were in substantial part based. The statutes in those cases were adjudged to be arbitrary and unreasonable interference with the conduct of educational institutions because they restricted "the liberty of parents and guardians to direct the upbringing and education of children under their control".[23]

In any event, whatever the theory upon which the decision of the Court below was based, there can be no doubt of this Court's power to affirm that decision on the ground that the statute violates the religious liberty guaranty of the First Amendment.[24]

Framing the issue in terms of religious liberty rather than regulation of business requires this Court to adopt a stricter standard of permissible legislative action. As this Court said in *West Virginia State Board of Education* v. *Barnette*:

> "The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."[25]

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[20] 262 U. S. 390 (1923).
[21] 262 U. S. 404 (1923).
[22] 268 U. S. 510 (1925).
[23] *Pierce* case, 268 U. S. 510, 534 (1925).

[24] *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1937): "In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed although the lower courts relied upon a wrong reason." *White* v. *Higgins*, 116 F. 2d 312, 318 (1940): "An Appellee may urge, or the Appellate Court may consider, any theory, argument or reason in support of a decision of a lower tribunal whether or not such theory, argument or reason was relied upon or even considered by or suggested to the court below."

[25] 319 U. S. 624, 639 (1943)

We therefore submit the issue to this Court in these terms: Does the Hawaiian statute restrict religious liberty, and if it does, is the restriction necessary to prevent grave and immediate danger to interests which the territorial legislature may lawfully protect?

Summary of Argument

The Hawaiian statute limits the free exercise of religion since, under its terms, teaching of the Bible and prayers in the Biblical tongue as prescribed by the Jewish religion is prohibited. Such prohibition is constitutionally justified only if clearly and immediately necessary to protect an interest more important to democratic society than the unrestricted exercise of religion.

The interest which the Hawaiian legislature purported to protect is the prevention of interference with the understanding and assimilation of studies in the English language. But proof is lacking that the restrictive legislation here in issue is clearly and immediately necessary for that purpose. Moreover, in balancing the conflicting interests, the Court must accord to the free exercise of religion the preferred status intended by the framers of the First Amendment and may sanction infringement only where the protected interest is of manifestly superior importance. Measured by that test, we submit that, even if enactment of the statute were the only means of protecting this interest, the interest is subordinate in importance to the free exercise of religion.

Finally, a study of the legislative history of this and similar statutes establishes clearly that its real purpose is to coerce cultural monism. Such an aim, being inconsistent with our democratic ideals and national policy, is equally insufficient to justify interference with the free exercise of religion.

POINT I

The Hawaiian statute unconstitutionally restricts religious liberty, since the statute is not clearly and immediately necessary to protect an interest more important to democratic society than the free exercise of religion.

I. The Hawaiian statute restricts religious liberty.

The Hawaiian statute by prohibiting the teaching of a foreign language to children before they have passed the first four grades of school, in effect prohibits the teaching of a foreign language to all children before they reach the age of ten (R. 79). In addition, the statute prohibits the teaching of foreign languages to "below average" children until they reach the age of fifteen (R. 80). The Court below found only the first part unconstitutional (R. 85) but invalidated the entire statute, notwithstanding its saving clause, on the ground that its provisions are not divisible (R. 86).[26]

As we have pointed out, the statute here in issue does not exempt religious schools (as did the statute invalidated in the *Farrington* case)[27] nor does it (as did the statute invalidated in the *Meyer* case)[28] exclude "the so-called

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[26] We believe that the court below was in error in suggesting that the statute would be constitutional if limited to "below average" children. No doubt, a statute so limited would appear valid if no issue of religious liberty were involved, and the only question were its reasonableness in the light of legislative findings. With the question of religious liberty present, however, a contrary result must be reached. The Constitutional protection of religious liberty is not limited to persons of average or over-average intelligence. Nevertheless, it is sufficient for the purpose of this case to confine our discussion to that aspect of the statute which, in effect, prohibits the teaching of a foreign language to any child who has not reached ten years of age.

[27] 273 U. S. 284, 291 (1927).

[28] 262 U. S. 390, 400 (1923).

ancient or dead languages".[29] Hence, even if Biblical Hebrew could still be termed an ancient language[30] (and the modern revival and use of Hebrew renders such an assumption untenable), it is clear that the restrictions imposed by the statute in the present case apply to the teaching of Hebrew in Jewish religious schools.

There can be little doubt that a statute which prohibits the teaching of Biblical Hebrew to Jewish children under ten years of age[31] restricts the religious liberty of the children, their parents and teachers.

Following the Biblical command "thou shalt teach them diligently to thy children",[32] the Rabbis, whose teachings are embodied in the Talmud, ordained that every child should begin study of the Bible in the Hebrew tongue at the age of five.[33] Even before the child reaches that age and as soon as he is able to speak, Jewish religion requires his father to teach him the meaning of simple prayers.[34]

When the Jewish child reaches five, he must be taught to read and understand Hebrew so that he may learn to recite and understand his prayers.[35] When he reaches the

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[29] See opinion below (R. 85): "The defendants state the Act interdicts the teaching of even Latin or Greek . . . and we agree."

[30] It was so designated in the *Meyer* case: 262 U. S. 390, 400 (1923).

[31] While the statute presumably permits teaching a foreign language to one child at a time (Sec. 1872), we do not think it unfair to say that the practical effect of the statute is to prohibit all foreign language instruction. In any event, as is indicated in the text, the Jewish religion prescribes *school* teaching.

[32] Deuteronomy 6, 7.

[33] Ethics of the Fathers, Chapter 5, Mishnah 21, in The Mishnah, Danby Translation, p. 458; V Jewish Encyclopedia 43.

[34] Maimonides, *Mishneh Torah* (Repetition of the Law), Ch. 1, paragraph 6: "Every father is obligated to teach his child Torah. When the child begins to speak, he must teach him the words 'The Law which Moses commanded us is the inheritance of the Congregation of Jacob', and 'Hear, O Israel, the Lord is our God, the Lord is one.' Thereafter, he must teach him sentence by sentence, in accordance with his physical and mental development, until the child reaches six or seven, when he must be brought to a teacher."

[35] Tractate Sukkoh (Babylonian Talmud) 42a; Shulchon Aruch, Jire Draf (compiled by Joseph Caro and Moses Isserles); Ch. 245, sections 5, 8, Maimonides, *supra*, note 34.

age of six or seven, depending upon his physical and mental development, the Jewish religion requires that his education be transferred to schools, communally or privately conducted.[36] Accordingly, about the year 60, High Priest Joshua ben Gamala decreed that every community, no matter how small, must conduct an elementary school to receive and educate all children of six years and over.[37] Since that time religious education of Jewish children has always been a communal as well as parental responsibility[38] and attendance of children at religious schools a parental obligation.[39]

Since we are submitting this brief in behalf of the substantial portion of the Jewish community which we represent, we have emphasized that the statute in issue restricts the free exercise of religion on the part of Jews.[40] It is immaterial that the record does not disclose the existence of a Jewish community or Jewish religious schools in

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[36] Maimonides, *supra*, note 34, Ch. II, paragraph 2; Shulchon Aruch, Jire Deah, *supra*, note 35, Ch. 245, section 8; Moses of Coucy, Great Book of Commandments, Part 2, paragraph 12.

[37] Tractate Baba Bathra (Babylonian Talmud) 21a; 2 Graetz, *History of the Jewish People*, 249; Grayzel, *History of the Jews*, 121; 3 Universal Jewish Encyclopedia 631.

[38] Margolis and Marx, *History of the Jewish People*, 210-211; Roth, *Jewish Contribution to Civilization*, 43.

[39] See *supra*, note 34; V Jewish Encyclopedia 43. The extent to which universal education had spread among the Jewish people by the fourth century is indicated by the following question and answer appearing in *Tractate Shebuoth* (Babylonian Talmud) 5a: "Is it possible to find anyone without elementary school knowledge?" "Yes, it is possible in the case of a child who was taken captive among idol worshippers."

[40] Cf. Konvitz, "Law Restricting Teaching of Foreign Languages Held Unconstitutional", Common Ground, Winter 1949: "Before Pearl Harbor there were in Hawaii large schools teaching the Chinese and Japanese languages in the afternoon, after the regular schools had adjourned—a pattern followed in the continental United States by the Jewish schools known as Talmud Torahs. It was these language schools that the act was intended to reach."

Hawaii. It may safely be assumed that a significant Jewish community exists in Hawaii, and in the light of the express commands of the Jewish religion, it may be equally assumed that Jewish religious schools are conducted (as indeed is the case [41]), at least within the all-embracing definition of the Hawaiian statute.[42]

In any event, this statute and similar ones restrict the liberties of all religious denominations. Under this statute, no Catholic preparing for the priesthood could legally learn the Latin necessary for the performance of his priestly functions until he attained the age of ten, and many might not until they reach fifteen (R. 85). The Court below pointed out that the statute "would apply to a religious Chinese descended mother having an educated cousin teach two of her children in her home the truths of Confucius, even orally, explaining the words of that spiritual guide in the language in which they are spoken and recorded" (R. 80). The prosecution in the *Meyer* case was based on the use in the parochial school conducted by the Zion Evangelical Lutheran Congregation of a collection of Biblical stories written in German.[43] In *Bartels* v. *Iowa*,[44] too, the defendants were teachers in a Lutheran Evangelical Congregational school.[45] Thus, the Jewish religion is not the only one restricted by anti-foreign language statutes.

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[41] We are informed by letter from Rabbi Emanuel Kumin, Territorial Director of the National Jewish Welfare Board for Hawaii, that there is a substantial Jewish community in Honolulu which maintains a congregation and a religious school, and that Jewish children of public school age regularly attend the religious school on Sunday mornings and two afternoons during the week.

[42] ". . . any person . . . [who] teaches, with or without fees, . . . two or more persons as a group. . . ." Section 2.

[43] 262 U. S. 390, 397 (1923).

[44] 262 U. S. 404 (1923).

[45] *Ibid.*, p. 409.

2. A restriction of religious liberty is constitutionally justifiable only if clearly and immediately necessary to protect an interest more important to democratic society than the unrestricted exercise of religion.

There can, of course, be no doubt that the religious freedom guaranteed by the First Amendment does not embrace absolute "freedom to act" and that all conduct "remains subject to regulation for the protection of society".[46] Concededly, the First Amendment does not preclude proscription of polygamy,[47] breaching the peace,[48] or child labor,[49] and we need not deny that engaging in religious teaching may be such conduct and thus subject to governmental regulation.[50] Nevertheless, the usual presumption of constitutionality supporting legislation is balanced, in legislation regulating rights secured by the First Amendment, by "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment".[51] Hence, "any attempt to restrict these liberties must be justified by clear public interest,

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[46] *Cantwell* v. *Connecticut*, 310 U. S. 296, 303-304 (1940).

[47] *Reynolds* v. *United States*, 98 U. S. 145 (1878); *Davis* v. *Beason*, 133 U. S. 333 (1890).

[48] *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942).

[49] *Prince* v. *Massachusetts*, 321 U. S. 158 (1944).

[50] Cf. *Musser* v. *Utah*, 333 U. S. 95 (1948).

[51] *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). While this case deals with freedom of speech and of assembly; its principles are certainly not less applicable to freedom of religion. Cf. *Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946). Indeed, in the *Thomas* case the Court based its argument on the freedom of religion aspect of the First Amendment, stating: "This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience." *Id.* 531. And in *Prince* v. *Massachusetts*, 321 U. S. 158, 164 (1944), the Court "doubted" that "freedom of conscience is entitled to a *broader* protection" than "freedom of the mind", and indicated its opinion that all "the great liberties insured by the First Article . . . have a preferred position in our basic scheme".

threatened not doubtfully or remotely, but by clear and present danger".[52]

It is not sufficient to establish that a clear and immediate danger exists. It must be established with equal clarity that the restriction imposed upon the rights guaranteed by the First Amendment is necessary to meet the danger. Ordinarily, if a situation exists requiring legislative action, it is for the legislature and not the courts to determine the appropriateness of a proposed remedy, and the courts may not interfere unless the legislature's act was patently unreasonable.[53] But for legislation abridging a liberty secured by the First Amendment, a sterner test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice."[54]

Finally, even if a clear and present danger to an interest which the legislature has a right to protect is shown to exist, a restriction on a right secured by the First Amendment is constitutionally justified only if the interest sought to be protected is more important to American democracy than the unrestricted exercise of religion. "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitations."[55] Exercise of the rights secured by the First Amendment "lies at the foundation of free government by free men. . . . Mere legislative

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[52] *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). See also *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943).

[53] *United States* v. *Carolene Products*, 304 U. S. 144 (1938).

[54] *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). See also, *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96 (1940): "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." See also, *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943).

[55] *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945).

preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." [56]

Measured by any of these tests, we submit, the Hawaiian statute fails. First: There is no evidence of the required clarity that the danger purportedly legislated against actually exists. Second: It has not been satisfactorily established that the legislation is necessary or appropriate to meet the danger. Third: The danger legislated against is less serious than the restriction on religious liberty imposed by the statute.

3. The Hawaiian statute is not clearly and immediately necessary to protect an interest more important to democratic society than the unrestricted exercise of religion.

a. THE EXISTENCE OF A DANGER

The Hawaiian legislature purported to find and declared that "the study and persistent use of foreign languages by children of average intelligence in their early and formative years definitely detract from their ability to understand and assimilate their normal studies in the English language . . . retard their progress in understanding and assimilating such studies; . . . [and] may and do in many cases cause serious emotional disturbances, conflicts and maladjustments. . . ." [57]

This Court, of course, is not bound by these findings. It can and must determine for itself whether these dangers actually exist. If it were otherwise, violation of the basic guarantees of the First Amendment could be accomplished by the simple expedient of "finding" that a sufficiently grave danger exists.[58]

Considering the two findings in inverse order, the extensive literature on the subject reveals no real evidence to support the finding that bilingualism may and does "cause

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[56] *Schneider* v. *State of New Jersey*, 308 U. S. 147, 161, (1939)

[57] Section 1 (Ch. 31, Sec. 1871).

[58] *United States* v. *Carolene Products*, 304 U. S. 144, 152 (1938)

serious emotional disturbances, conflicts and maladjustments". One investigator did find a difference in the extent of emotional maladjustment between bilingual and monoglot college students, but she did not conclude that bilingualism was the *cause* of the greater maladjustment; what she found was that both the bilingualism and the maladjustment were the effect or symbol of the environmental factors converging upon "second generation" Americans.[59] Indeed, the maladjustment seems to be an incident of the widening cultural gap between first and second generation Americans[60]—a gap which bilingualism actually helps to bridge.

Nor have we been able to find any scientific evidence that bilingualism causes intellectual retardation. Seth Arsenian, after studying the voluminous literature on the subject and the results of nearly one hundred investigations in this country, found that: "Bilingual children as compared with monoglot children of the same age and environment are neither retarded nor accelerated in their mental development."[61]

Another investigator divided one hundred ten-year old Jewish girls into four groups according to the amount of Yiddish spoken in the home, and tested them on the Stan-

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[59] Spoerl, *Bilinguality and Emotional Adjustment*, 38 Journal of Abnormal Psychology (1943), 37, 57. Dr. Spoerl summarized his findings as follows: "Our conclusion, then, is that the emotional maladjustment of the bilingual student insofar as it expresses itself in terms of family disharmony is a result of the culture conflict to which the native-born children of immigrants is subjected. . . . Thus it is that bilingualism enters into the situation, not in its intra-personal aspects, but rather as a symbol of the environmental factors converging upon the 'second generation'. *Most of the emotional maladjustment of the bilingual student is environmentally determined and is not the result of mental conflict engendered by the complexities of thinking or speaking in two languages.*" (Emphasis added.)

See also, Arsenian, *Bilingualism in the Post-War World*, 40 Psychological Bulletin (1945) 65, 86.

[60] McWilliams, *Brothers under the Skin*, 104-105.

[61] Arsenian, *supra*, note 59.

ford Binet test (a verbal test) and the Pintner Paterson Performance test. Group I came from homes in which only English was spoken; Groups II and III were intermediate and Group IV heard only Yiddish in their home. No significant differences on intelligence test scores of either test were found, indicating that bilingualism among these Jewish girls did not retard either their mental or verbal development.[62]

A careful, intensive study of 469 sixth and seventh grade Jewish children was conducted by Pintner and Arsenian, who reached the following conclusions:

> "On the basis of these results, it is apparent that insofar as this population and the tests used (Pintner intelligence test and Pintner non-language intelligence test) are concerned, the association between bilingualism and intelligence is practically zero and the differences in I. Q. on both tests (verbal and performance) of high and low bilingual groups are statistically insignificant.
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> "High and low bilingual groups of boys and girls equated on socio-economic status were compared as to their performance on these same intelligence tests and no statistically significant differences were found. It is concluded that bilingualism in this particular population (Jewish) bears no relation to verbal intelligence and school adjustment as measured by the tests employed."[63]

We submit, therefore, that there is no substantial evidence that bilingualism causes either emotional malad-

[62] Halpern, F. C., Intelligence of Bilingual Jewish Girls as Measured by the Stanford Binet Test and Pintner Paterson Performance Test, Unpublished Thesis, Columbia University, Library.

[63] Pintner and Arsenian, *The Relation of Bilingualism to Verbal Intelligence and School Adjustment*, 31 Journal of Educational Research, 255, 263. It should be pointed out that in this study an effort was made to determine the effects of bilingualism on school adjustment as measured by a separate test for the purpose, namely, the pupil portraits test, form A. In this area, as well as in intelligence, there were no significant effects to be attributed to bilingualism.

justment or retardation of mental achievement. There is, we concede, some evidence that bilingualism may in some cases have a retarding effect on language development and school achievement.[64] But even here the evidence is far from being so clear as to justify restriction of a right guaranteed by the First Amendment. Thus, several hundred Jewish boys and girls in the third and fourth grades of public school were divided into two categories, "mostly English-speaking" and "mostly Yiddish-speaking" backgrounds, and received vocabulary, analogies, sentence completion and reading tests. No reliable differences between the two groups were found. The experimenter, Schiller, concluded that it is obvious that these Jewish children are not penalized on English verbal tests by being subjected to a greater amount of non-English speech.[65]

Symonds, who studied attendance at Chinese language schools in Honolulu on English lingual ability, reached the following conclusion:

> ". . . the effect of the Chinese language school on the English ability of its students is so small as to be negligible. . . . Taking Chinese children as you find them, they are not noticeably retarded in English because of attending foreign language schools."[66]

Others, too, have found no significant difference between bilingual and monoglot children. Indeed, in some instances bilingual children were found to possess a larger English vocabulary than the monoglots.[67] But even those who find measurable retardation in language development properly attributable to bilingualism agree that the retardation is

[64] See, e.g., Testimony of Dr. M. E. Smith, R. 404-406.

[65] Schiller, *Verbal, Numerical, and Spatial Abilities of Yuma Children*, Archives of Psychology, No. 161.

[66] The Effect of Attendance at Chinese Language Schools on Ability with the English Language, 8 Journal of Applied Psychology, 411, 441 (1924).

[67] Arsenian, *supra*, note 59.

dissipated as the child's educational development advances."[68]

We submit, therefore, that evidence to support a finding that bilingualism causes retardation or maladjustment lacks by far the clarity and cogency required to justify legislative restriction on the free exercise of religion.

b. The appropriateness of the remedy

Even if bilingualism does bring with it some retardation in school achievement, the restriction on religious liberty imposed by the Hawaiian legislature has not been shown to be clearly necessary or appropriate to meet the evil. As the Court below pointed out, it is incumbent neither upon those who attack the statute nor upon the courts to suggest legislative means of combatting the evil within constitutional limitations; that is the responsibility of the legislature. The Hawaiian statute cannot stand if it is not clearly established that it is an appropriate and necessary measure to meet the evil at which it is aimed.[69]

We do not believe that the Hawaiian legislature has established with the clarity required to justify restraints on religious liberty that achievement retardation can be met only by outlawing foreign language schools for all children under ten years and for at least half of them between ten and fifteen.

The scientific evidence which we have discussed may indicate a measurable relationship between bilingualism and retardation in verbal development but the statute here in issue does not proscribe bilingualism; it outlaws foreign language schools. Bilingualism is generally acquired not

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[68] Terman found that for the bilingual student, vocabulary is lower than mental age up to the third or fourth grade, but after twelve years of age, vocabulary is equal to mental age. *The Vocabulary Test as a Measure of Intelligence*, 9 Journal of Educational Psychology 452-466 (1918). See also: Decroly, *Essai d'application du test de Ballard dans les ecoles Belges*, 27 Annee Psychologique 59-93 (1926); Saer, *An Inquiry into the Effect of Bilingualism upon the Intelligence of Young Children*, 6 Journal of Experimental Pedagogy 232-240, 266-274 (1922).

[69] See notes 54, 56, *supra*.

by reason of attendance at a foreign-language school but because a second language is spoken at home. The retardation that results may therefore be well attributable not to the acquisition of a second language but to the unpedogogical method through which it was acquired or to the fact that it was acquired before the primary language.

That bilingual instruction in schools does not necessarily have a retardative effect is supported by substantial scientific authority. A committee appointed to inquire into the conditions of schools attended by French-speaking pupils in Canada found that "proficiency in the use of one language is assuredly no barrier to securing equal proficiency in the other if proper methods of organization and instruction are followed."[70]

Most significant is the experiment conducted by M. E. T. Logie, the director of a school in the Union of South Africa, by special permission of his government. The pupils in his school were given bilingual instruction, the same lesson being taught in Afrikaans and then recited in English, or vice-versa; the same teacher taught the subject in both languages without favoring either one or the other. Children playing games were carefully mixed rather than divided into linguistic groups, so that the affective as well as the purely language learning factors were constant for the two language groups. After four years of this experience the children were tested as to their knowledge of both the mother tongue and of the second language and also as to their proficiency in arithmetic (this subject being selected as a test for logical thinking) and geography. The results of these tests were compared with the results of the same tests taken by pupils in unilingual English and Afrikaans schools. *On none of the tests were the bilinguals shown to be inferior to their unilingual contemporaries.*[71] This experiment, more crucial than any others, shows that bilin-

[70] Report of Committee Appointed to Inquire into the Condition of the Schools Attended by French Speaking Pupils, Canada. Department of Education (1927).

[71] Bovet: *Les Problems scolaires poses par le bilinguisme.* Pour l'Ere Nouvelle, No. 105, Feb., 1935.

gualism per se need not cause retardation even in the elementary school.[72]

We submit, therefore, that even if any school achievement retardation can properly be attributed to bilingualism, it has not been clearly established that an absolute prohibition of foreign language schools for all children under ten is a necessary or appropriate means to remedy the evil.

c. The gravity of the danger

Even if some retardation in school achievement were an inevitable consequence of bilingualism and could only be avoided by prohibiting foreign language schools, the Hawaiian law would be invalid since unrestricted exercise of religious liberty is more important to American constitutional democracy than the avoidance of such retardation.

In "adjudicating the clash of freedoms which the Bill of Rights was designed to resolve—the freedom of the community to regulate its life and the freedom of the individual to exercise his religion",[73] this Court must give due recognition to "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment."[74] These "liberties possess a sanctity and a sanction not permitting dubious intrusions".[75]

This Court has been diligent in protecting the religious liberty secured by the First Amendment. Interests which the state would seem to have a clear right to protect have been held subordinate. Governmental power to prevent fraud,[76] preserve cleanliness of streets,[77] regulate highway

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[72] Arsenian, *supra*, note 59.

[73] Mr. Justice Frankfurter concurring in *Marsh* v. *Alabama*, 326 U. S. 501, 511 (1946).

[74] *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945).

[75] *Ibid.*

[76] *United States* v. *Ballard*, 322 U. S. 78 (1944); *Schneider* v. *New Jersey*, 308 U. S. 147 (1939).

[77] *Schneider* v. *New Jersey*, 308 U. S. 147 (1939); *Martin* v. *Struthers*, 319 U. S. 141 (1943).

traffic,[78] raise revenue [79] and require overt manifestations of loyalty [80] are all subject to restriction when their exercise interferes with religious liberty. Even the rights of an owner to determine who shall enter upon his property may be subordinate to the free exercise of religion.[81]

Governmental interference with the upbringing of children has been consistently invalidated by this Court.[82] Only a grave danger to the physical health of the public [83] or of children [84] justifies legislative restraint upon "the right . . . to bring up children" [85] and "high duty . . . to prepare [them] for additional obligation".[86]

Even if there were substantial evidence that bilingualism is responsible for some school retardation and emotional maladjustment, and an inference could be drawn (unsupported by any evidence) that prohibition of foreign language schools for the young would eliminate bilingualism, governmental interference with the religious liberty of parent and child would not therefore be constitutionally justified. Exercise of religion, particularly a minority or unpopular religion, is likely to entail some material sacrifice.

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[78] *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

[79] *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Follett* v. *McCormick*, 321 U. S. 573 (1944).

[80] *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

[81] *Marsh* v. *Alabama*, 326 U. S. 501 (1946).

[82] *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Bartels* v. *Iowa*, 262 U. S. 404 (1923); *Farrington* v. *Tokushige*, 273 U. S. 284 (1927); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

[83] *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905) (compulsory vaccination statute).

[84] *Prince* v. *Massachusetts*, 321 U. S. 158 (1944) (child labor law).

[85] *Meyer* v. *Nebraska*, 262 U. S. 390 (1923).

[86] *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925).

Undoubtedly the State has power, as *parens patriae*, to promote the welfare of children; but that power does not include the right to compel parent and child to elect the temporal to the exclusion of the eternal. The secular education obtained by children at a state conducted public school may be superior, measured by mundane standards, than the education obtained at many parochial schools, but would a legislative finding to that effect have resulted in a contrary decision in the *Pierce* case? Any emotional maladjustment which might be attributable to bilingualism is insignificant compared to that suffered by an eight or nine year old Jehovah's Witness who alone in his school refuses to salute the American flag. Would a legislative finding to that effect have resulted in a contrary decision in the *Barnette* case? If the legislature were to find that some sectarian teaching has a damaging effect upon the emotional and intellectual development of children,[87] would that fact justify censorship of religious teaching? Obviously, legislative power to promote the welfare of children is circumscribed by the boundaries of the First Amendment.

POINT II

The real purpose of the Hawaiian statute, to achieve a monolithic nationalism by coercion, being inconsistent with our national policy, does not justify interference with the free exercise of religion.

1. The real purpose of the Hawaiian statute.

We believe that the Hawaiian statute is but another in the long and tragic history of futile attempts to achieve cultural monism by outlawing minority languages.

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[87] Cf. Moehlmann, *School and Church: The American Way*, 92-93; Thayer, *Religion in Public Education*, 27; Moehlmann, *The Church as Educator*, ch. 5; Beckes, *Weekday Religious Education; Help or Hindrance to Inter-Religious Understanding*, National Conference of Christians and Jews, Human Relations Pamphlet No. 6 (1946).

The term "genocide" has been created to describe the destruction of a nation or an ethnic group,[88] and "cultural genocide" the destruction of its cultural patterns.[89]

Attempts to destroy a minority group's cultural pattern by forbidding the use or teaching of its language have been numerous and uniformly futile.[90] Alsatian resistance to German attempts to outlaw French teaching after 1870[91] has been immortalized in Alphonse Daudet's classical story "The Last Lesson". Both Prussia and Czarist Russia attempted to stamp out Polish by forbidding its teaching in the schools.[92] The Austro-Hungarian government promulgated numerous decrees seeking to eliminate from the Empire languages other than German or Hungarian.[93] After the First World War, Italy attempted to wipe out German from the territory acquired from Austria,[94] and Nazi Germany forbade use of the local language in schools in areas incorporated into the Greater Reich.[95]

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[88] Lemkin, *Axis Rule in Occupied Europe*, 79.

[89] *Ibid.*, p. 84.

[90] 9 Encyclopedia of Social Sciences 167; Schlauch, *The Gift of Tongues*, 280; Hayes, *Essays in Nationalism*, pp. 239-240: "Many have been the attempts to compel dissident nationalities to conform to the nationalism of the dominant majority. Germans between 1871 and 1914 pursued fairly systematically a policy of Germanizing dissentent Poles, Danes and Alsatians; they forced the use of the German language in the schools and even in religious instruction. . . . This 'Germanisation' or 'Prussianisation' was paralled in other countries by a 'Russification,' 'Magyarisation,' 'Ottomanisation', etc.: and the 'Americanisation' which has recently been much in evidence in the United States, if not employing all the methods of 'Prussianisation,' sets itself a familiar goal."

[91] The Germans prohibited use of the French language not only in schools, but even on gravestones. Hazen, *Alsace-Lorraine under German Rule*, pp. 172-173; LeBlanc, La Liberte d'Enseignement en Alsace et Lorraine; p. 101.

[92] 9 Encyclopedia of Social Sciences 167; Tims, *Germanizing Russian Poland*, p. 78.

[93] *Ibid.*

[94] *Ibid.*

[95] Lemkin, *supra*, note 88, p. 84; Jacoby, *Racial State*, 150

In the United States, legislative attempts to restrict the use or teaching of minority languages have always been motivated by antagonism to ethnic minorities. The statutes invalidated in the *Meyer* and *Bartels* cases were purportedly enacted because the

> ". . . legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country."[96]

The avowed purpose of the anti-parochial school law invalidated in the *Pierce* case was to

> ". . . encourage the patriotism of . . . citizens, and train . . . younger citizens to become more willing and more efficient defenders of the United States in times of public danger."[97]

The State of Oregon argued in support of the statute that

> ". . . if the Oregon School Law is declared unconstitutional there will be nothing to prevent the establishment of private schools, the main purpose of which will be to teach disloyalty to the United States, or at least the moral duty to refuse to aid the United States even in case of a defensive war."[98]

Similarly, the "declared object" of the earlier Hawaiian statute held unconstitutional in *Farrington* v. *Tokushige*

[96] *Meyer* v. *State*, 107 Neb. 657 (1922). See also: *Nebraska District of Evangelical Synod* v. *McKelvie*, 104 Neb. 93 (1919); *Bartels* v. *State*, 191 Ia. 1060 (1921); *Pohl* v. *State*, 102 Ohio St. 474 (1922).

[97] *Pierce* v. *Society of Sisters*, 268 U. S. 510, 528 (1925).

[98] *Ibid.*

was to regulate foreign language schools "in order that the Americanism of the pupils may be promoted".[99]

It is significant that these statutes were all enacted during the period immediately following the First World War,[100] marked by intense nationalism and xenophobia,[101] culminating in the exclusionary National Origins Immigration Act of 1924.[102] The statute involved in the present case was also enacted in the period of intense nationalism, suspicion of foreigners, particularly Japanese,[103] and general hysteria, which followed Pearl Harbor.[104] We submit that the motivations and purpose underlying the present statute were the same as those underlying the previous American statutes and which underlie anti-foreign language laws generally.[105]

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[99] 273 U. S. 284, 293 (1927).

[100] The Nebraska, Iowa and Ohio statutes were enacted in 1919. The Hawaiian law was enacted in 1920.

[101] Hayes, *supra*, note 90; Davie, *World Immigration*; Allen, *Only Yesterday*, Ch. 3.

[102] 43 Stat. 153.

[103] Cf. *Hirabyashi* v. *United States*, 320 U. S. 81 (1943); *Korematsu* v. *United States*, 323 U. S. 214 (1944); *Ex parte Endo*, 323 U. S. 283 (1944); See also Konvitz, *The Alien and Asiatic in American Law*, chap. 11; McWilliams, *Brothers under the Skin*, chap. IV.

[104] The Japanese language schools were closed and the statute enacted during the period of martial law in Hawaii following Pearl Harbor. R. 34.

[105] During the height of the anti-Japanese hysteria in California, the State Senate appointed a legislative committee on Japanese Resettlement. The Committee "vigorously opposed . . . the return of any Japanese to California until after the end of the war with Japan," and recommended the strengthening of the Alien Land Laws [practically invalidated in *Oyama* v. *California*, 332 U. S. 633 (1948)] and the Anti-Japanese Fishing Laws [invalidated in *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410 (1948)], and *the regulation of Japanese language schools.*" Report of California Senate Fact Finding Committee on Japanese Resettlement, May 1, 1945.

Even zoning laws have been employed to achieve cultural uniformity. At Mt. Kisco, N. Y., the application of a former famous European Talmudic college to conduct a vocational training school in connection with its seminary was granted on condition that English become the language of secular instruction. N. Y. Times, November 27, 1948 (editorial page).

2. The expressed purpose of the Hawaiian statute.

The expressed purpose of the law is to prevent the educational retardation and emotional disturbance which presumably results from attendance at foreign language schools. We submit, however, that this Court is not bound by the legislative declaration of purpose and must determine the constitutionality of the law in the light of its true purpose.[106] This Court has never considered itself under any disability which prevents it from looking beyond the formally declared statutory purpose in order to perceive those factors which, in reality, constitute the legislative motive.[107] There would be little left of the constitutional

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[106] *Meyer* v. *Nebraska*, 262 U. S. 390, 399-400 (1923): "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the Courts."

[107] *Muggler* v. *Kansas*, 123 U. S. 623, 661 (1887):

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

See also *Fairbank* v. *United States*, 181 U. S. 283 (1901); *Child Labor Tax Case*, 259 U. S. 20 (1922). See also concurring opinion of Mr. Justice Murphy in *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, 427 (1948) (invalidating statute whose expressed purpose was fish conservation):

> "We should not blink at the fact that § 990, as now written, is a discriminatory piece of legislation having no relation, whatever, to any constitutionally cognizable interest of California. It was drawn against a background of racial and economic tension. It is directed in spirit and in effect solely against aliens of Japanese birth. It denies them commercial fishing rights not because they threaten the success of any conservation program,

liberties secured by the First Amendment if a legislative declaration of a permissible purpose stopped judicial inquiry into the reality of the situation.

The fact that the absolute ban is limited to children below ten years of age does not negate our contention that the dominant purpose of the legislation was to promote cultural uniformity and nationalist loyalty rather than prevent educational retardation. Anti-foreign language statutes whose expressed purpose is to promote nationalism are generally limited to children in elementary schools. The Nebraska, Iowa and Ohio statutes invalidated in the *Meyer* and *Bartels* cases prohibited foreign language instruction to children who had not yet attained the eighth grade in elementary school.[108] The Hawaiian statute declared invalid in the *Farrington* case prohibited attendance by children who had not passed the second grade.[109] The order concerning the use of the German language in Luxembourg, issued by the Nazi gauleiter permitted use of the French language in post-elementary schools.[110] Under the statute here in issue, the permissive point is the fourth grade for half the children and the fifteenth year for the other half. The substance, however, is not different.

The change in the legislative findings and expressed purpose was clearly motivated by a desire on the part of the Hawaiian legislature to circumvent the decisions in the *Meyer*, *Bartels*, *Pierce* and *Farrington* cases. Such change in form without change in substance follows what has be-

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not because their fishing activities constitute a clear and present danger to the welfare of California, or of the nation, but only because they are of Japanese stock, a stock which has had the misfortune to arouse antagonism among certain powerful interests."

[108] 262 U. S. 390, 397 (1923); 262 U. S. 404, 409-411 (1923).

[109] 273 U. S. 284, 294 (1927).

[110] The order provided: "The language of instruction in all chools shall be exclusively German. In primary schools the French language shall no longer be taught as a subject of instruction; in secondary schools courses in the French language shall continue to be given". Lemkin, *Axis Rule in Occupied Europe*, p. 440.

come the usual pattern in legislative action discriminating against minority racial or religious groups. Legislatures have shown imagination and ingenuity in devising new forms seeking to evade decisions of this Court prohibiting racial zoning,[111] excluding Negroes from primary elections,[112] furnishing Negroes with inferior educational facilities,[113] and restricting economic opportunities of Japanese.[114] These attempts to disguise the true purpose of discriminatory legislation have consistently failed. We do not believe the present attempt will be more successful.

3. Cultural genocide and national policy.

Cultural genocide, and particularly that aspect which involves elimination of minority languages is antagonistic to American national policy. The treaties which terminated the First World War all contained specific provisions guaranteeing the right of minority ethnic groups to conduct primary schools in their own language.[115] While these

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[111] *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Harmon* v. *Tyler*, 273 U. S. 668 (1927); *Richmond* v. *Deans*, 281 U. S. 704 (1930).

[112] *Nixon* v. *Herndon*, 273 U. S. 536 (1927); *Grovey* v. *Townsend*, 295 U. S. 45 (1935); *United States* v. *Classic*, 313 U. S. 299 (1941); *Smith* v. *Allwright*, 321 U. S. 649 (1944).

[113] *Plessy* v. *Ferguson*, 163 U. S. 537 (1896); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938); *Sipuel* v. *Board of Regents*, 332 U. S. 631 (1948).

[114] *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Oyama* v. *California*, 332 U. S. 633 (1948); *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410 (1948).

[115] Robinson, *Were the Minorities Treaties a Failure?* 37-38. See, e.g., Treaty with Poland (Versailles, June 28, 1919), Article 9: "Poland will provide in the public educational system in towns and districts in which a considerable proportion of Polish nationals of other than Polish speech are residents adequate facilities for ensuring that, in the primary schools, the instruction shall be given the children of such Polish nationals through the medium of their language. This provision shall not prevent the Polish Government from making the teaching of the Polish language obligatory in the said schools." The official texts of the relevant provisions can be found in Protection of Linguistic, Racial and Religious Minorities by the League of Nations, Publication of League of Nations, 1927.

treaties failed of ratification by the United States Senate, there can be no doubt that these provisions for protection of minority rights represented the American national policy.[116] Indeed, "in some instances the articles are almost verbatim abstracts from the classical documents of individual and national emancipation, such as the English Bill of Rights, the American Declaration of Independence, the Preamble and Amendments 1, 4, 5, 14 (Section 1) and 15 of the United States Constitution, and the Declaration of the Rights of Man of the French Revolution".[117]

Treaties and international conventions which have been ratified by the United States Senate and are part of our international law reflect our national policy against cultural genocide and the destruction of minority languages. The American-British Palestine Mandate Convention of 1924[118] guarantees the right of each ethnic "community to maintain its own schools for the education of its own members in its own language, while conforming to . . . educational requirements of a general nature".[119] The Resolution of the United Nations General Assembly, the adoption of which was largely the result of American efforts, reiterated this guaranty and required its adoption as a part of the constitutional law of the proposed Israeli and Arab states.[120]

As was pointed out in the *Pierce* case, "the fundamental theory of liberty upon which all government in this Union reposes excludes any general power of the State to stan-

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[116] 10 Encyclopedia of Social Sciences, 520.

[117] Robinson, *supra*, note 115, p. 39.

[118] Ratified by the Senate, Feb. 20, 1925.

[119] Article 15, Publications of the Department of State, Near Eastern Series No. 1, Publication No. 153, p. 110.

[120] November 29, 1947, Chapter 2, section 6. "The right of each community to maintain its own schools for the education of its own members in its own language, while conforming to such educational requirements of a general nature as the State may impose, shall not be denied or impaired."

dardize its children" by prohibiting exposure to diverse educational experiences.[121] This principle has been adopted by the United Nations General Assembly and incorporated into its Universal Declaration of Human Rights, in whose formulation and adoption the United States delegation played a substantial part.[122]

4. Coerced uniformity and religious liberty.

In the light of these expressions of American policy, it is clear that coerced cultural uniformity is not more important to American democracy than the exercise of the rights guaranteed by the First Amendment. This Court has repeatedly held that the "desire of the legislature to foster a homogeneous people with American ideals" does not justify restriction of the personal liberties secured by the Constitution.[123]

There was a time when many Americans believed that the welfare of our country demanded the elimination of cultural differences. Homogeneity was the goal and would-be immigrants were welcomed or excluded in accordance with unproved assumptions of their assimilability.[124] Americanization meant standardization and uniformity. People who boasted of being 100% American were looked upon with favor, while "hyphenated Americans" were in disrepute.[125] The anti-foreign language statutes which

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[121] 268 U. S. 510, 535 (1925).

[122] Article 26, par. 3: "Parents have a prior right to choose the kind of education that shall be given to their children." N. Y. Times, December 7, 1948, p. 13.

[123] *Meyer v. Nebraska*, 262 U. S. 390, 402 (1923); *Bartels v. Iowa*, 262 U. S. 404 (1923); *Farrington v. Tokushige*, 273 U. S. 284 (1927).

[124] Immigration Commission Reports, Sen. Doc. 758, 61st Cong., 3rd Sess. (1911); Hearings before House Committee on Immigration, 67th Cong., 3rd Sess. (Nov. 21, 1922), p. 279, *et seq.*; House Report 350, Part 2, 68th Cong., 1st Sess. (1924); Davie, *World Immigration*.

[125] Hayes, *supra*, note 90.

have previously been invalidated by this Court were a product of that era.[126]

We have, we believe, outgrown that adolescent period of chauvinistic culturalism.[127] We have reached the stage of national maturity and accept the concept of cultural democracy according to which all groups "majority and minority alike [have] the right to be different and the responsibility to make sure that their differences do not conflict with the welfare of the American people as a whole".[128] We have begun to realize that we are a people of peoples, whose strength lies in diversity.

For these reasons we believe that legislation seeking to destroy cultural differences in American life is inconsistent with enlightened American policy. We do not contend that legislation seeking that end through voluntary measures would be unconstitutional. We do submit, however, that legislation seeking to attain that end through coercion is unconstitutional, at least where the legislation restricts the free exercise of religion.[129]

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[126] The Oregon statute invalidated in the *Pierce* case was enacted as result of Ku Klux Klan control of the State's political machinery. Myers, *History of Bigotry in the United States*, 293.

[127] Young, *American Minority Problems*, 460.

[128] Cole and Vickery, *Intercultural Education in American Schools*, p. 50. See also authorities cited *supra*, note 6.

[129] It is doubtful that elimination of bilingualism and foreign language schools is necessary or even an aid to the assimilation and cultural uniformity. Young, *American Minority Peoples*, 465-466. The effectiveness of compulsion as a method of Americanization is even more doubtful. *Ibid.*, p. 459. It might therefore be urged that the means adopted by the Hawaiian legislature are not so clearly necessary and appropriate to achieve the end of uniformity to justify restriction of religious liberty. We have preferred, however, to limit our discussion to the validity of the end rather than the appropriateness of the means.

This principle has been stated eloquently by this Court in striking down a law requiring manifestations of national loyalty by saluting the flag:

> "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.
>
> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity.
>
> As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. . . ." [130]

[130] *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 640-641 (1943).

Measured by this standard, the Hawaiian statute cannot stand.

Respectfully submitted,

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New York, January, 1949.

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IN THE

Supreme Court of the United States

October Term, 1948

No. 52

INGRAM M. STAINBACK, Governor of the Territory of Hawaii, WALTER D. ACKERMAN, JR., Attorney General of the Territory of Hawaii, and W. H. LOPER, Superintendent of Public Instructions of the Territory of Hawaii,
Appellants,

—vs.—

MO HOCK KE LOK PO, an eleemosynary corporation, DAI KUNG CHINESE SCHOOL, an eleemosynary corporation, *et al.*

BRIEF OF THE JAPANESE AMERICAN CITIZENS LEAGUE, *AMICUS CURIAE*

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BRIEF OF THE JAPANESE AMERICAN CITIZENS LEAGUE, *AMICUS CURIAE*

Interest of Japanese American Citizens League

The Japanese American Citizens League, hereinafter referred to as JACL, as *amicus curiae*, files this brief pursuant to the Court's Rule XXVII(9) and upon the written consent of the parties. JACL is the only national organization representing persons of Japanese ancestry in the United States. Its membership is open to all United States citizens without discrimination as to race, color, creed, or national origin. Its program is best summarized in its slogan: "For Better Americans in a Greater America", and by the slogan of its Anti-Discrimination Committee: "Equal Rights, Equal Opportunities for All". Although the

JACL is primarily concerned with the welfare and problems of persons of Japanese ancestry in this country, it believes that it is appropriate that it express its views upon the fundamental personal and family rights involved in the instant case affecting other minorities as well as persons of Japanese ancestry.

Statement

The essential facts, fully set forth in the briefs of the parties, are that plaintiffs-appellants, three eleemosynary corporations conducting schools in Hawaii for the education of children in the Chinese language, a teacher of the Chinese language, and two individual residents of Hawaii who desired to have their children taught the Chinese language sought to enjoin, as unconstitutional, the enforcement of a Territorial statute regulating the teaching of languages other than English to children under the age of fifteen years. The statute involved (Act 104 of the Hawaiian Legislature, enacted on May 1, 1943) prohibits the teaching of any language other than English in any school, as defined in the statute, to all children under the age of fifteen years who have not passed the fourth grade in public school or its equivalent, and thereafter to children who have not passed in each succeeding grade thru the eighth grade a standard test in English composition and reading with a score not lower than normal for the grade. The District Court, composed of three Judges, determined that the statute in violation of the Fifth Amendment deprives the parents of the ten thousand children above the average in intellectual ability in the first four grades of school in the Territory of Hawaii of their right to have these children taught a language other than English, and deprives the schools and the teacher named in the complaint of their right to teach such children the Chinese language.

ARGUMENT

The statute deprives parents of the fundamental right to have their children taught a language other than English and deprives schools and teachers of their rights to engage in teaching of languages other than English to children in violation of the due process clause of the Fifth Amendment.

The District Court correctly stated that parents have a fundamental right to have their children taught languages other than English, and schools and teachers have the right to pursue the vocation of teaching such languages which are protected by the due process clauses of the Fifth and Fourteenth Amendments. *Farrington* v. *Tokushige*, 273 U. S. 284; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Bartels* v. *Iowa*, 262 U. S. 404; *Meyer* v. *Nebraska*, 262 U. S. 390.

It is submitted that the District Court correctly held that these judicial precedents require the determination that the present statute violates the due process clause of the Fifth Amendment.

A. *The Statute Unconstitutionally Prohibits and Restricts the Teaching of Languages other than English.*

The statute here in question is at least as objectionable to the Constitution as the former statute of the Territory held unconstitutional in *Farrington* v. *Tokushige*, *supra*. The present statute purports to be based on legislative findings that study of a language other than English retards pupils in their studies carried on in the English language and in many cases causes serious emotional disturbances, conflicts and maladjustments, and that their health

and welfare will be promoted by the statutory prohibition of, and restriction upon, their study of any language other than English. This attempt to justify the statute on such a basis rather than on the basis that it promotes "Americanization" of children, already found inadequate under earlier decisions of this Court, fails utterly to meet the constitutional objection to interference with the fundamental right of parents to have their children taught a language other than English and the right to teach such a language. The constitutional rights involved are too fundamental to be trifled away by such dubious legislative recitals. In *Meyer v. Nebraska, supra*, this Court settled the question in the following language (262 U. S. 390, 401):

> "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means."

In *Berea College v. Kentucky*, 211 U. S. 45 involving a state statute requiring segregation of races in private educational institutions, Harlan, J., dissenting from the view of the majority of the Court that the only question presented was the narrow one of the right of a corporation to teach classes not segregated by race, correctly stated the fundamental constitutional issue as follows (211 U. S. at 67, 69):

> "The capacity to impart instruction to others is given by the Almighty for beneficient purposes and its use may not be forbidden or interfered with by Government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. * * * Have we become so inoculated with prejudice of race that the American government, professedly based on the principles of freedom, and charged with protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races?"

It is submitted that these authorities relied upon by the Court below require the conclusion that the statute involved is a wholly unwarranted and unconstitutional interference with the private teaching of languages other than English.

B. ***The Statute Involved is not Warranted by the Operation of Private Language Schools.***

This wartime statute is an unfortunate and mistaken expression of racism which is particularly regrettable in the Territory where, on the whole, the race relations of the inhabitants of many national origins have exhibited to the world an example of harmony. On the specious grounds of promoting education and health the statute denies to parents, who have the grave responsibility for their children's moral development, the use of a language other than English which may be the best, if not the only, means which the parents have for communicating with and guiding their children in their most formative years.

Even though disloyal activities in connection with the operation of private language schools has been disclaimed as the basis for the legislation, it is nevertheless true that

this wartime statute probably never would have been enacted in 1943 if the mistaken notion were not then current that in some vague and undetermined manner the language schools, particularly Japanese language schools, involved disloyal activity. The report of the Committee on Education of the Senate of the Territory of Hawaii which recommended passage of the bill mentions, without stating any supporting facts, that there was strong reason to believe that the Japanese language schools had been a means of disseminating detrimental propaganda from foreign sources (R. 34). Similarly, as a justification for the evacuation of all persons of Japanese ancestry from the West Coast, some reliance was placed upon the supposedly disloyal activities of Japanese language schools. Dewitt, *Final Report Japanese Evacuation from the West Coast*, 1942, pp. 12-13; *Hirabayashi* v. *United States*, 320 U. S. 81, 97. The utter inadequacy of this ground, as well as the other grounds relied upon, for this hasty and harsh military evacuation undertaken in the confusion of the first months of the war, was completely revealed only upon subsequent study prompted by the extreme exercise of the war power involved in this treatment of one minority of our population.

The Japanese language schools in the United States were first established by Christian missions with the dual purpose of assisting the children born here to learn their parents' tongue, and of assisting the parents to learn English. *Wartime Exile*, United States Department of the Interior, War Relocation Authority (1946) p. 46;[1] *Annals*

[1] "The first Japanese language schools in America were set up by Christian missions. They were established for two purposes: first, to help the newly arrived immigrant learn enough English to make his way in the new country; to help the few children of that early period * * * to learn to read and write their parent's tongue. The first Japanese language school

of the American Academy of Political and Social Science, January 1921, pp. 95-96. Scholarly and scientific examinations of the operation of the Japanese language schools have supported them as socially useful American institutions. H. A. Millis, *The Japanese Problem in the United States* (1915) pp. 265-266; Marian Swinstad, "Attitude of the Japanese Toward Their Language Schools", *Sociology and Social Research*, January-February, 1933, pp. 259-264; Reginald Bell, *Public School Education of Second Generation of Japanese* (1935) pp. 26, 99; E. K. Strong, *The Second Generation Japanese Problem* (1934) p. 205; *cf.* Y. Ichihashi, *The Japanese in the United States* (1932) pp. 329-333. No subversive teachings have been shown in connection with the Japanese language schools. McWilliams, *Prejudice*, pp. 123-124 [cited in *Korematsu* v. *United States*, 323 U. S. 214, 237].

Ironically, although the existence of Japanese language schools was relied on in part as a basis for the military evacuation from the West Coast, individuals of Japanese ancestry who knew the Japanese language were of invaluable assistance to the armed forces of the United States during the war. Although it is not claimed that attendance at these schools produced finished Japanese linguists, it is the experience of the many members of the JACL who attended such schools that such attendance provided a useful foundation in the Japanese language which saved many months in training desperately needed Japanese linguists at such training centers as the Army Japanese language school at Camp Savage, Minnesota. There is ample and unquestioned evidence that United States citizens of Jap-

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in the United States was established in 1887 in San Francisco as a project of the Japanese gospel society. Two years later a Methodist mission [illegible] Japanese started a [illegible] school. [illegible] It was not until 1899 that a Buddhist mission, patterned after the Christian, opened a school in San Francisco."

anese ancestry generally, and the language schools in particular, made important contributions to the successful progress of the war in the Pacific. In *Wartime Exile*, *supra*, it is stated (pp. 49-50):

> "The most telling refutation of the charges made by the West Coast racists against the language schools is to be found in the extensive use made of the graduates of these schools by the Army and Navy in the war against Japan. In the summer of 1942, while the Nisei were still being classified automatically as 4-C (registrants not acceptable for military training and service because of nationality or ancestry) the War Department relaxed its regulations to the extent of accepting qualified Nisei for special assignments. The Intelligence branch of the United States Army periodically sent recruiting officers to the relocation centers to interview and examine candidates. Loyal American citizens of Japanese ancestry were badly needed to teach the fundamentals of the Japanese language to officers of Military Intelligence and also to serve as translators and interpreters. The Kibei, perhaps the most commonly misunderstood group within the Japanese American minority, suspect because they had part or most of their education in Japan, and the Nisei graduates of Japanese language schools in America answered this call and subsequently proved invaluable to the armed forces of the United States, both as instructors in the language schools conducted by Military Intelligence for its officers and as translators and interpreters with the fighting men in the Pacific Theatre. The Navy, while refusing to induct Americans of Japanese ancestry as enlistees, nevertheless used them as civilian instructors in its language school for

intelligence officers at Boulder, Colorado, and later permitted the Marines to borrow Nisei in uniform from the Army to ease progress through enemy-held territory in the Pacific."

In Bradford Smith's *Americans from Japan* (1948), it is stated (pp. 324-326):

"Arthur Komori of Honolulu was in the Philippines with Wainwright. Ordered out before the fall of Bataan, he helped establish ATIS, the Allied Translation and Intelligence Service, which came to have over a thousand Nisei and which translated between two and three million pages of documents. American Nisei were in demand not only by our own forces, but by the British, the Australians, and all our other allies in the Pacific. We were the only ones fortunate enough to have Japanese among our own people. The enemy had no inkling of the extent to which we were able to decipher their messages. Relying on the supposed security of their difficult language, they took inadequate precautions. But even their codes we were able to break.

"General Charles Willoughby, MacArthur's Chief of Staff for Intelligence, says their work shortened the war by two years. Handling top secret information, they uncovered data on the real strength of the Japanese army which led to a complete revision in our plans for ship-building at a saving of billions, and saved a good many men from the draft by a downward revision of the Selective Service program. In Europe they tapped sources revealing the extent of Japanese liaison with the Germans.

"Never before in history, say military officers, did one army know so much about its enemy prior to actual engagement as did the American army throughout most of the Pacific campaign. The Nisei were our secret weapon."

In *I Was an American Spy*, Saturday Evening Post, April 10, 1948, Col. Sidney F. Mashbir, Chief of Staff for Intelligence under General Douglas MacArthur, stated:

"A majority of our translators were American Nisei. Had it not been for the loyalty, bravery, and ability of these Japanese Americans, many phases of intelligence work in the Pacific would have fallen flat. I know that their faithful service to the United States saved many thousands of American lives and shortened the war by months. It must be realized that this group of men had more to lose than any others participating in the war. Had any of them been captured their torture would have been indescribable.

"None of them ever showed the white feather, although ATIS Nisei accompanied assault units on every landing from Papua to the Philippines. More than 150 were finally given direct commissions. The rest were promoted several grades. An exceptionally high percentage were decorated or cited for valor."

Finally, the fact that attendance at Japanese language schools, either in Hawaii or on the mainland, did not in any way adversely affect the loyalty of Americans of Japanese ancestry was dramatically and finally settled not only by their military work as Japanese linguists, but also by their unsurpassed record as combat troops in the European as well as in the Pacific theatre of operations.

The combat record of the Nisei from both Hawaii and the mainland is well known.

The legislative findings cannot conceal the fact that the real motivation for this wartime legislation was race prejudice. Happily the manner in which our American racial minorities served the cause of democracy in the war has completely exposed the lack of any basis for this racial prejudice. In *Korematsu v. United States*, 323 U. S. 214, Justice Murphy in his dissenting opinion stated the constitutional doctrine which outlaws racism as follows (p. 242):

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2 Former Assistant Secretary of War John J. McCloy wrote to the Chairman of the Subcommittee of the Judiciary Committee of the House of Representatives considering a bill to remove the racial discrimination in our naturalization laws in part as follows (Hearings on H. R. 5004, 80th Cong. 2nd Sess. p. 51):

"* * * The record of the Nisei battalions is one of the most spectacular of all our military units. They endured many hard and even bitter campaigns. Their record shows that they won at least as many, if not more, decorations for bravery as any units of the same size in the entire Army.

"In every respect they performed their fullest duty to the country. Their casualties were heavy and I think that their conduct and the conduct of the Japanese-Americans in Hawaii and elsewhere throughout the United States is the strongest evidence one could ask for of their full loyalty to the country."

General Mark W. Clark wrote similarly (*ibid.* p. 52):

"* * * The supreme test of citizenship is the willingness of a man to risk his life so that our country may live.

Under my command in Italy the Four Hundred and Forty-second Infantry Regiment and the One Hundredth Infantry Battalion, composed of nisei, fought the Nazi combat forces with the valor and skill characteristic of the young Americans that they are. * * *

As I recall the outstanding feats of valor in combat of the members of the Four Hundred and Forty-second Infantry and the One Hundredth Infantry Battalion, the number of Purple Hearts awarded to them because of wounds received in battle, and their extremely low hospital rate because of their eagerness to return to the line after having been wounded, I can only urge that the rights of citizenship in our great America be given to the parents who furnished us with such outstanding young manhood, men who willingly gave their all that America could live."

> "All residents of this land are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be at all times treated as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution."

In *Duncan* v. *Kahanamoku*, 327 U. S. 304, Justice Murphy, concurring, stated (p. 334):

> "Racism has no place in our civilization. The Constitution as well as the conscience of mankind disclaims its use for any purpose, military or otherwise. It can only result, as it does in this instance, in striking down individual rights and in aggravating rather than solving the problems toward which it is directed. It renders impotent the ideal of the dignity of the human personality, destroying something of what is noble in our way of life. We must therefore reject it completely whenever it arises in the course of a legal proceeding."

It is submitted that the present statute, actually aimed at the prohibition and restriction of teaching oriental languages, Japanese and Chinese, is an undemocratic, arbitrary and unconstitutional restriction on personal freedom. Such legislation, attempting to stamp out the mother tongues of minority groups, is a mark of autocratic and totalitarian governments which cannot survive the test of our democratic Constitution.

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3 For example, the Imperial Russian and Italian governments at one time prohibited the use of the Polish and German languages in territories acquired by them. "Language", Vol. IX *Encyclopedia of Social Sciences*, p. 167.

CONCLUSION

The judgment appealed from should be affirmed and the statute involved should be held to be an unconstitutional interference with personal freedom in violation of the Fifth Amendment to the Constitution.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1948.

No. 52.

INGRAM M. STAINBACK, Governor of the Territory of Hawaii, WALTER D. ACKERMAN, JR., Attorney General of the Territory of Hawaii, and W. H. LOPER, Superintendent of Public Instruction of the Territory of Hawaii,

Appellants,

vs.

MO HOCK KE LOK PO, an eleemosynary corporation, DAI KUNG CHINESE SCHOOL, an eleemosynary corporation, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, an eleemosynary corporation, WAH CHAN THOM, WILFRED CHONG and LEONG NGET CHO,

Appellees.

BRIEF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS, AMICUS CURIAE.

CONGRESS OF INDUSTRIAL ORGANIZATIONS,
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Appellees.

BRIEF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS, AMICUS CURIAE.

Preliminary Statement.

The issues raised by the instant case are of the most profound significance to *amicus curiae*. The Constitution of the Congress of Industrial Organizations, as do the constitutions of its various constituent labor organizations, contains statements of fundamental policy against discrimination because of race, creed, color, or nationality, and this organization is dedicated to the elimination of such discrimination.[1]

[1] Article II of the Constitution of the Congress of Industrial organizations: "First. To bring about the effective organization of the working men and women of America regardless of *race, creed, color, or nationality*, and to unite them for common action into labor unions for their mutual aid and protection."

Since its formation in 1935, the Congress of Industrial Organizations has condemned the evil of racial discrimination and has actively instituted educational and legislative programs to end that evil. During the recent world-wide conflict, the same period within which the Hawaiian statute here concerned was passed, this organization adopted a resolution in convention restating its opposition to all forms of racial discrimination.[2]

Amicus Curiae herein has a direct interest in the problems presented by this case. Many of its members in Hawaii and elsewhere are persons whose native tongue is other than English; of these and other members, many live in bilingual or multilingual communities. The Hawaiian statute, by prohibiting the teaching by anyone of any language other than English to children has and will augment existing racial, religious and nationalistic discord with a resultant serious effect upon the assimilation programs of this organization in its striving for the betterment of working conditions and living conditions for workers in this multilingual area and elsewhere. In addition, the discrimination against the working man, here the

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[2]"WHEREAS, discrimination against workers because of *race, religion or country of origin* is an evil characteristic of our fascist enemies. We of the democracies are fighting fascism at home and abroad by *welding all races, all religions and all peoples into united body* of warriors for democracy. Any discriminatory practices within our own ranks, against negroes or other groups, directly aids the enemy by creating division, dissension and confusion. Any discriminatory practices in employment policies hampers production by depriving the nation of the use of available skills and manpower; therefore be it

"RESOLVED, that the CIO reiterates its firm opposition to any form of racial or religious discrimination and renews its pledge to carry on the fight for protection in law and in fact of the rights of every racial and religious group to participate fully in our social, political and industrial life."

teacher, one of the most important occupations in a country dedicated to freedom of speech and thought and intellectual progress, through no fault or wrongdoing on his part, is of vital concern to the Congress of Industrial Organizations, dedicated to working for the welfare of the working man.

With approximately one-third of the population of the United States foreign born and their children,[3] assimilation of these persons with the rest of our citizenry presents grave social, economic and cultural problems in addition to problems created by the language differences. In these days of internationalism and the express policy of the United States in support of internationalism, the advantages of knowing one or more foreign languages cannot be denied. In Hawaii and other sections of this country where more than one language is essential, "the question is no longer *which* language, but how both languages may be satisfactorily utilized and their functions integrated."[4] Instead of recognizing this problem for what it is, the legislature of Hawaii has chosen one language from among the many in common usage in that community, and determined that only that language may be taught to children for a period of their lives, cutting off in their early formative years and perhaps forever, one opportunity to learn of the diverse cultural heritage of the community. By so doing, they are doing a disservice to that community and the United States as a whole in the betterment of relations with minority groups and in im-

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[3] Covello, Leonard, "Language as a Factor in Integration and Assimilation," 23 *Modern Language Journal* 323 (Feb. 1939)

[4] Gordon, Maxine W., "The Bilingual Problem of Puerto Rico," 54 *School and Society* 462 (June 21, 1947).

proving the culture of this country. "The potential resources lying fallow in the rich cultural background of the large numbers of our population who are of foreign descent, could, if effectively capitalized rather than suppressed, be made to yield a new world culture of infinite variety and fertility."[5]

The broadest aspects of this problem concern not merely the non-English speaking child continuing with education in his native tongue, but also the acquisition of foreign languages by the native English speaking child, all part of a process of assimilation in a multilingual community, indeed, a multilingual world. Just in the United States, there are besides Hawaii, many areas where large groups of native foreign language speaking people reside. For example: there are French speaking groups in New England and Louisiana; Scandinavians in the northern Middle West; some 2,000,000 Spanish speaking persons in the Southwest; Indian reservations; almost the whole population of Puerto Rico is native Spanish speaking and there are islands to a lesser extent in Pennsylvania, Connecticut, New York and practically all the large cities.[6]

Because of the necessity for the common usage of two or more languages in such a community, the question is not the theoretical one of the advantages of knowing foreign languages or at what age the mere intellectual exer-

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[5]Kaulfer, Walter V., and Holland D. Roberts, *A Cultural Basis for the Language Arts*, 1937, quoted in Kaulfer, Walter V., Grayson N. Kefauver, Holland D. Roberts, Editors, *Foreign Languages and Cultures in American Education*, 1942 (a compilation of reports of teachers who participated in the Stanford Language Arts Investigation for handling minority group language and cultural problems at the high school level).

[6]Tireman, L. S., *Teaching Spanish-Speaking Children*, 1948, p. 9.

cise of learning a foreign language should be given a child, on which there is a wide range of authority.[7] Here, some 178 foreign language schools, practically all of which teach either Japanese, Chinese or Korean languages, have been conducted and attended almost exclusively by persons of Japanese, Chinese and Korean ancestry, respectively [R. 450, 436-437]. The hours are arranged so that children attending the schools also attend, full time, the public schools [R. 435]. With respect to those attending these schools, then, the problem is not one of choice as to whether a second language should be begun in early elementary school, for English is here generally the second language and this the children are compelled to learn to some extent. Rather it is the problem of con-

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[7]Many years ago, it was "commonly considered appropriate to introduce students to a modern language at the college level." G. T. Busswell, *A Laboratory of the Reading of Modern Foreign Languages*, 1927. Since that time, the view has been increasingly accepted that for best results in both conversational and written work in foreign languages, with satisfactory retention throughout life, instruction should be given at a younger age. Leonard Bloomfield, "About Foreign Language Teaching," *Yale Review* 625 (June, 1945); Isabella Yeiser, "The Why and How of Teaching French to Little Children," 23 *Modern Language Journal* 591 (May, 1939) (Citing Angelo Patri, the noted New York educator, as an advocate of beginning the study of a foreign language at the age of three).

See, Weiner F. Leopold, *Speech Development of a Bilingual Child*, 1939, Preface vii: "From the wide reading in the enormous literature on child language I have come to the firm conviction that it is too early to attempt generalizations on this subject. . . . There are not enough exact records of individual cases to serve as the basis for a comprehensive study."

See also, J. S. Tireman, *Teaching Spanish-Speaking Children*, 1948, p. 19, and A. F. Watts, *The Language and Mental Development of Children*, 1944, pp. 51-57, 265 (A Study of English Children showing a tremendous increase in vocabulary between the ages of five through seven, a slowing down until fourteen, then a gradual tapering off as maturity approaches, after which the increase is negligible).

tinuing some studies in the native tongue and of the native culture of these children while learning a new language and to some extent a new culture in the public schools.

In countries abroad,[8] and in other parts of the United States, this situation has been given various treatments. In no case in modern times except for the instant cases, instances in the United States after World War I, remedied by this Court, and in certain fascist countries prior to World War II, has the teaching of a native tongue or a second language been prohibited to private parties and parents. The tendency, on the contrary, is to recognize the language and cultural problem in a realistic and sympathetic way by beginning the instruction of the dual or triple language of the community in the elementary schools. In California, for example, provision is made for the teaching of certain foreign languages, particularly Spanish, beginning in kindergarten, mandatory in cities of certain sizes and optional in others.[9] In Puerto Rico, after some experimentation in the public schools, in 1935, Spanish was used as the sole medium of instruction, with English continued throughout elementary school as a double time special subject.[10] In New Mexico, 50% of the total population, it has been estimated, is native Span-

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[8]For example, see: Darbelnet, J., "French for Anglo-Canadians in Quebec," 65 *Education* 529 (May, 1945); Silva, Homero Castillo, "Teaching the Foreign Language English in Chile," 65 *Education* 526 (May, 1945); Tuercke, Kurt Egon Fehr V., *Das Schubrecht der detuschen Volks gruppen in Ost-und*, 1938.

[9]*Cf.* California Education Code, Secs. 9361, 10302.

[10]Tireman, L. S., *Teaching Spanish Speaking Children*, 1948, pp. 32-36.

ish speaking. There, as in Texas, instruction in Spanish is begun in the elementary grades."[11]

This type of approach, in contrast to the oppressive means here used, has been to work toward assimilation, which cannot be done by one minority group by itself.[12] As was so well stated by Leonard Covello, Italian born principal of the Benjamin Franklin High School in East Harlem, New York:

> "In reaching the non-English speaking groups, it is futile to use only the English language. . . . Through languages familiar to them, the school should assist in bringing to them the best that America can offer. At the same time, the younger generation should be encouraged to learn the language of their parents. It is not only a part of their racial heritage, it becomes a bond of interest in the home of the foreign-born and their American-born children. It enables the family to share experiences. The older people learn from the child the things the child is learning in school and gain thereby a firmer hold on the heart and life of the child. In turn, the child gains from his parents a sense of belonging to fineness and greatness through an appreciation of his own racial heritage. . . . Lacking knowledge of the language of his parents, the child can share only partially in the life, experiences and affection of his parents. . . . Instead of merging gradually under the invisible pressure of a harmonious daily life,

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[11] *Ibid.*; Mays, Ruth, "Teaching Spanish in the Lower Grades," 25 *Hispania* 141 (May, 1942). It should be noted that in addition, there are and have been for many years private school systems of this sort throughout the country.

[12] *Farrington v. Tokushige*, 11 F. 2d 710, 714.

> the two heritages are frequently in conflict. . . . How can the problems of the child in school be adjusted when there is no way of arriving at an understanding of these problems through conferences with parents? . . . How can the school fulfill its mission if it isolates itself behind a language barrier?"[13]

This loss of contact between parent and child caused by too rapid a transition by the child into the foreign culture, generally under poor social and economic conditions, causes delinquency on the part of the child, in large part avoided where the native tongue is maintained along with the learning of English.[14]

Because of these considerations, the Congress of Industrial Organizations views this Hawaiian statute as an arbitrary and unreasonable limitation on the very basic right of earning a living in a useful and highly skilled field, and as a statute designed to defeat the gains of years of progress in the difficult and highly explosive field of assimilation of minority groups in this country, with necessarily a direct adverse effect upon the welfare of the common working man. This organization therefore files this brief as *amicus curiae* urging this Court to affirm the District Court decision below holding the statute unconstitutional.

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[13]Covello, Leonard, "Language as a Factor in Integration and Assimilation," 23 *Modern Language Journal* 323, 329-330 (Feb., 1939).

[14]Ross, H., "Crime and the Native Born Sons of Immigrants," 28 *Journal of Criminal Laws and Criminology* 202, 1938.

See also, Klineberg, Otto, *Social Psychology*, 1940; Shaw, C. R., *Jack-Roller*, 1930.

Statement of the Case.

Act 104, Session Laws of Hawaii, 1943 (Chapter 31, Revised Laws of Hawaii 1945) entitled "An Act Regulating the Teaching of Foreign Languages to Children" provides, in brief, that no child shall be taught a foreign language in any school; defined as a person or association which teaches "with or without fees" any language other than English "to two or more persons as a group, as a regular and customary practice. (Sec. 2(a)) unless he has passed the fourth grade, and in succeeding grades standard tests in English or unless he has passed the eighth grade or attained the age of fifteen years. (Sec. 3.) Teachers in such schools must be examined and certified to be "reasonably well versed in the usage and idiom of both the English language and the foreign language to be taught by such teacher." (Sec. 4.) Representatives of the department of public instruction of the Territory are empowered to attend these "schools" when in operation. (Sec. 5.) The Act provides for enforcement by the Attorney General by injunction proceedings (Sec. 6). Section 1 of the Act is a "Declaration of legislative findings" to the effect that the "study and persistent use of foreign languages by children of average intelligence in their early and formative years definitely detract from their ability properly to understand and assimilate their normal studies in the English language . . . and definitely retard their progress in . . . such studies . . . cause serious emotional disturbances, conflicts and maladjustments; . . . that it is to the best interest, and will promote the health and welfare, of children of tender age to defer foreign language study until certain proof of ability in English is shown or the fourth grade completed, or the child is nine, and such study be regulated until the child is fifteen years of age or has passed the eighth grade.

Appellees are three Hawaiian corporations chartered to teach the Chinese language, one a Chinese language teacher and two parents (the complaint was dismissed as to these two for lack of jurisdiction). Appellants are officials of the Territory of Hawaii. Appellees, successfully, sought to enjoin enforcement of this statute in the District Court of the United States for the Territory of Hawaii. Appellee school teacher alleges that he does not speak English and does not desire to submit to a test in the English language. Each of appellees alleged themselves to be bringing this action in a representative capacity for others similarly situated.

No question is here raised as to the power of the territory to compel the study and use of English as a medium of instruction in the public schools, nor the teaching of general subjects outside the public schools, nor any question of disloyalty to the United States.

The issue raised, aside from jurisdictional and other more technical points, is the conflict between the power of the state to legislate with regard to an admitted evil, retardation of students in the public schools, and the right of parents to direct and control the intellectual activities of their children outside compulsory school hours, along with the rights of those whose occupation is directly concerned with these intellectual activities. This brief will be limited to a discussion of this issue.

ARGUMENT.

I.

Act 104 Is Unconstitutional Because It Violates the Due Process Provisions of the Fifth Amendment.

It is purely by historical accident that the official language of the United States is not an Indian dialect, not Spanish, not French, but English. Under the guise of protecting the welfare of the child, the Legislature of the Territory of Hawaii has enacted a statute (Act 104, Session Laws of Hawaii 1943, Chapter 31, Revised Laws of Hawaii 1945) prohibiting in effect the formalized teaching in any manner of any language other than English during the early formative years of the child's life. Throughout history, various means have been used to unify large segments of populations politically, as for example Catholicism during the days of the Holy Roman Empire; it is only in fairly modern times that conformity in language has been considered as politically unifying and as an important aspect of nationalism.[15]

Appellants have attempted to distinguish the statute in the instant case from those held unconstitutional as a violation of fundamental civil liberties without due process of law in the *Society of Sisters*, *Meyer* and *Farrington* cases,[16] contending that those statutes were aimed at na-

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[15]Sapier, Edward, "Language," 9 *Encyclopaedia of the Social Sciences* 155.

[16]*Meyer v. Nebraska*, 262 U. S. 390; *Pierce v. Society of Sisters*, 268 U. S. 510; *Farrington v. Tokushige*, 273 U. S. 284.

tionalism and not the protection of the child (Appellant's Br. pp. 70-72).

Amicus Curiae agree with appellants that the question of the power of the legislature to enact this statute "must be adjudged against the factual background" (Appellants' Br. p. 96). The review of this background, however, does not include merely a review of facts showing retardation in the public schools in Hawaii and then a review of the range of authority among educators with respect to the effect of the simultaneous study of two languages by young children. The facts show a multilingual community, with certain cultural, social, economic as well as language traits in conflict with each other. The effect of the statute, whatever the declared legislative purpose, is to enforce conformity in a very important aspect upon the present and future generations of that community by prohibiting for a period of each and every child's life certain admittedly lawful and generally desirable knowledge to him, and to closely regulate the acquisition of this knowledge for some time thereafter.

Though the terms of this statute are broad, as was true of the Ohio statute,[17] the legislative history, the Record and appellants' contentions in the instant case show that the statute was aimed at a particular group, the Orientals, just as that statute was aimed at a particular group, the Germans.[18] Appellees and almost everyone of their patrons are Orientals, members of this group. For them the facts show, in this community the question is not so

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[17] *Bartels v. State of Iowa, Bohning v. Ohio*, 262 U. S. 404.

[18] It should be noted that Justice Holmes agreed with the majority of the Court as to the invalidity of this phase of the Statute

much one of studying a foreign language in addition to developing and perfecting English in the public schools, but rather the problem of continuing the study of a native tongue while learning English as a secondary language in the public schools. Study of a language necessarily includes some aspects of the culture, philosophy and history connected with such language. With this in mind, the contention that this statute is distinguishable from those in the *Society of Sisters*, *Meyer* and *Farrington* cases is not supported by the facts. Though the immediate objective of this statute is declared to be for the welfare of the child by curing retardation in the public schools, the ultimate effect, regardless, is to enforce a conformity in beliefs to the state without regard for the rights of the parents to direct and control the beliefs of the child. However desirable a common language may be for all people of the world, prohibitive restrictions of this nature may not be imposed upon individuals in the United States "without doing violence to both letter and spirit of the Constitution."[19]

II.

Act 104 Is an Unconstitutional Invasion of the Fundamental Freedoms Protected by the First Amendment.

In view of this contention that the instant case could involve no rights under the First Amendment (Appellants' Br. p. 76), it is necessary to determine the full breadth of the Fifth Amendment. The injury to appellees in its broadest sense is not merely a destruction of their business and property, but of their liberties including freedom

[19] *Meyer v. Nebraska*, 262 U. S. 390, 402.

of speech, assembly, religion and thought. Not only are their liberties in this respect injured, but those of their patrons. As this interference with their patron effects a destruction of appellees' business and property, the interest of appellee corporations and teacher in pressing for the protection of these liberties is "clear and immediate."[20]

In *Thomas v. Collins*, 323 U. S. 516, this Court made clear that the right of free speech has not been confined to any field of human interest and that it cannot be said that the safeguards of the First Amendment are wholly inapplicable to business or economic activity. It is the character of the right, not of the limitation, which determines what standard governs the choice. The occupation of a teacher is no less one concerned with the "dissemination of ideas" than that of the labor organizer involved in that case. There the mere threat of censorship through a licensing statute was held to constitute a violation of the Constitution. A far more serious violation exists in the instant case, for freedoms under the First Amendment are not merely threatened with censorship, but prohibited. The Legislature of Hawaii has attempted to find a solution to a problem of multilingualism which has affected the whole community. The state's power to legislate in the field of education, however, does not empower the state to abuse historic liberties and privileges. Though there has been no interpretation of the statute by the courts of the territory and appellants contend it will not be applied in an unconstitutional manner, in view of the circumstances, the statute on its face is a violation of the First Amendment. The definition of school in

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[20] *Pierce v. Society of Sisters*, 268 U. S. 510.

cludes not merely teachers in the formal sense, but parents of two or more children who instruct their children in their native tongue as a regular and customary practice. The statute applies whether the instruction is with or without "fees, compensation or other charges therefore." (Sec. 2(a).)

Appellants urge a different interpretation of the statute. Such can hardly be made in view of the language there employed. Any person or otherwise who teaches two or more children any language other than English through the children's early and formative years is within the statute. This is not merely the regulation of a business, but the teaching and learning of languages other than English being a lawful and useful pursuit, the prohibition of "The freedom and liberty to express ourselves privately and to hold private assemblies for lawful purposes and in a lawful manner . . . ." as well as the freedom to do so publicly, both protected by the First Amendment.[21]

The wisdom of the parents and the teachers in subjecting children to early training in the language and culture of their choice may not be attacked in this manner nor may their beliefs in this regard and the dissemination of their medium of speech and their culture be thus proscribed. "Men may believe what they cannot prove."[22]

Here, in the effort to provide for the welfare of the child, a field of knowledge is prohibited to him for an important part of his life; if unable or unwilling to subject himself to the terms of the statute, and if economic and

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[21] *Local 309 UFWA (CIO) v. Gates, Governor of Indiana*, 75 Fed. Supp. 620

[22] *United States v. Ballard*, 322 U. S. 78, 86.

social necessity compel the early termination of his formal education, perhaps forever.[23]

As this Court stated in *West Virginia Board of Education v. Barnette*, that the state is

> "educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[24]

This Court goes on to state:

> "We apply the limitations of the constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization."[25]

Whatever may be the rule with respect to legislation promoting merely the education, health and well-being of the child and removing obstructions thereto, the statute here involved, prohibiting for a period and severely regulating for another the intellectual freedom of parents, teachers and children in an attempt to shape present and future generations in the direction the state elects he should go, comes within the clear and present danger rule. Cases discussed by appellants under the first type of legislation have no bearing on the rule of law to be applied in the instant case. Vaccinations, limitations on the hours of labor, type and ages of employment, custody, adoption and guardianship proceeding where health or morals are

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[23]Opinion, R. 80.

[24]319 U. S. 624, 637.

[25]319 U. S. 624, 641.

jeopardized are directly connected with the health and moral welfare of the child. Where parents determine that acquisition of knowledge, in addition to that furnished in the public schools, is necessary for the sake of discipline of the child in his tender years and for preparation for his place in society as they know it, the state may not interfere. The wisdom of the parents in so doing, unless it causes serious health or delinquency problems, may not be questioned by the state. Throughout history proud parents and teachers have subjected children to beliefs and ideas in conflict with always a certain portion of the community. The resulting confused reaction to this training may no more be validly removed by legislation than the confusion felt by a child attending a Catholic or Hebrew or other religious school in a neighborhood of predominating contrary religious beliefs.

III.

Act 104 Is Unconstitutional as an Arbitrary and Unreasonable Exercise of the Police Power.

Under either the clear and present danger rule or the usual rule applied where legislation is attacked as denial of due process, the law must, at the very least, be reasonable, not arbitrary and the means selected must have a real and substantial relation to the object sought to be attained.[26]

Retardation in the schools is an admitted evil. Upon this the legislature may act. However, the legislation must not infringe upon rights secured by the fundamental law.[27]

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[26] *Nebbia v. New York*, 291 U. S. 502.

[27] *Otis v. Parker*, 187 U. S. 606, 609; *Booth v. Illinois*, 184 U. S. 425, 429.

To sustain the fundamental liberties of parents, children, schools and teachers against the present measure adopted to combat this recognized evil is not, under the circumstances (see Preliminary Statement and Statement of the Case, *supra*), "to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members."[28]

The denial to the child of the guidance of his parents by the creation of language and cultural differences between them; the denial of free speech, assembly, religion and thought to parents, children and teachers; the increase in social, economic, and cultural conflicts bound to result from the oppressive treatment of minority groups; the attempt to promote conformity to the state by prohibiting acquisition of knowledge in certain fields, renders the provisions of this statute unreasonable and void. "Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts."[29]

Even were the supposed evils and remedial action as stated by the legislature, this statute is unreasonable as including and excluding arbitrarily persons who should have been excluded or included respectively, under those findings. The public policy of the United States forbids any branch of the Federal or territorial governments to do what the Equal Protection Clause would deny to a state government.[30]

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[28] *Adkins v. Children's Hospital*, 261 U. S. 525, 561.

[29] *Lawton v. Steele*, 152 U. S. 133, 137.

[30] *Hurd v. Hodge*, 334 U. S. 24, 35-36.

A. Persons Arbitrarily Excluded.

The statute by defining "school" as "two or more persons as a group" (Sec. 2(a)) obviously excludes the situation where one child is taught, though as a "regular and customary practice" (Sec. 2(a)), and he is taught alone. This exclusion is not supported by the legislative findings.

A child taught a foreign language alone is no less subject to the evils found to exist than those taught in groups of two or more. Thus, arbitrarily, the statute discriminates in favor of one child families or those families with sufficient funds with which to provide private tutors for each and every child.

B. Persons Arbitrarily Included.

In providing that only those who have passed the fourth grade may undertake the study of "foreign languages," the legislature has made a provision conflicting with its express legislative findings that English deficiency is the cause of the retardation in the public schools, and once proficiency in English is met, the student may study a "foreign language," so long as his proficiency in English continues. By omitting provisions for such a situation, the legislature has arbitrarily included children who excel in languages, but may lack aptitude or inclinations to study other subjects. This is a denial of liberty of thought,

> "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes."[31]

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[31] *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 641-642.

Again, by the inclusion of all children, with the above exception (III A.), the act unreasonably discriminates against children of both above and below average intelligence. Whatever interpretation a territorial court might give the provisions, no child unless he has passed the fourth grade may study a foreign language. Those of above average intelligence whose progress in the public schools would not be retarded are arbitrarily included. Those of below average intelligence, who cannot meet the regular requirements of study in the public school systems anyway, as their education will probably terminate at an early age, forever lose the opportunity of youth "when familiarity with language is established,"[82] and the parents the opportunity to prepare a child to the best interest of the child to the full capacity of that child for the society in which he is to live.

By the inclusion of parents, the legislature has discriminated against non-English speaking persons in the most vital and important organization in our culture; the American home. Appellants contend the act will not be applied to them, but that is small comfort when they come within the express language of the statute if they teach two or more of their children as a group as a regular and customary practice. With respect to these people, the certificate and inspection provisions of the statute are particularly harsh and oppressive. The effect of the statute as

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[82] *Holmes dissent in Bartels v. Iowa*, 262 U. S. 404, 412.

to them more than any others is an infringement on the right to *use* a foreign language, prohibited by our Constitution.[33]

C. Restrictions Against Foreign Language Teachers.

Of very grave importance also to *amicus curiae* is the arbitrary discrimination against those in a particular occupation, useful, lawful, highly beneficial and skilled, without fault and with no relationship to the proficiency of persons in that occupation. This type of restriction is one of serious consequence to every working man or woman, especially those whose calling requires a lifetime of preparation and concentration. Not only is it a great skill to be able to teach languages well, but the teaching to children requires special art and training. By subjecting these persons to an arbitrary prohibition and regulation violates all basic principles of due process.[34] This profession involving the right of freedom of speech, religion (and it should be noted Sunday schools are not exempt from this provision, nor parochial schools of any kind), assembly and thought, the mere threat of censorship inherent in the licensing provisions of Section 4 and the inspection provisions of Section 5 of the Act are sufficient to invalidate those sections.[35]

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[33] *Yu Cong Eng v. Trinidad*, 271 U. S. 500

[34] *Adams v. Tanner*, 244 U. S. 590

[35] *Thomas v. Collins*, 323 U. S. 516

Conclusion.

Free experimentation by the state in educational fields is to be encouraged, but not at the expense of the fundamental civil liberties of individuals within the community and increasing racial and religious prejudices. This country has grown great on the interaction of cultural groups and the free dissemination of ideas. As the discrimination against one working man affects the rights of all, and the discrimination against one minority group or the restriction of acquisition of one field of knowledge is a signal to discriminate against and to restrict all. A statute of this nature must be struck down at the earliest opportunity lest it irreparably injure social, economic and cultural progress. We therefore respectfully urge this Court to affirm the judgment below.

CONGRESS OF INDUSTRIAL ORGANIZATIONS,
Amicus Curiae.

ARTHUR GOLDBERG,
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Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 474 474

INGRAM M. STAINBACK, GOVERNOR OF THE TERRITORY OF HAWAII; WALTER D. ACKERMAN, JR., ATTORNEY GENERAL OF THE TERRITORY OF HAWAII, ET AL.,

Petitioners,

vs.

MO HOCK KE LOK PO, AN ELEEMOSYNARY CORPORATION, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 474

INGRAM M. STAINBACK, GOVERNOR OF THE TERRITORY OF HAWAII; WALTER D. ACKERMAN, JR., ATTORNEY GENERAL OF THE TERRITORY OF HAWAII, AND W. H. LOPER, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE TERRITORY OF HAWAII,

Petitioners,

vs.

MO HOCK KE LOK PO, AN ELEEMOSYNARY CORPORATION; DAI KUNG CHINESE SCHOOL, AN ELEEMOSYNARY CORPORATION; CHUNG SHAN CHINESE SCHOOL ASSOCIATION, AN ELEEMOSYNARY CORPORATION; WAH CHAN THOM, WILFRED CHONG AND LEONG NGET CHO,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, BEFORE JUDGMENT.

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Ingram M. Stainback, Governor of the Territory of Hawaii, Walter D. Ackerman, Jr., Attorney General of the

Territory of Hawaii, and W. H. Loper, Superintendent of Public Instruction of the Territory of Hawaii, petitioners, respectfully pray for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit before the rendition of judgment in said court, for the review of a case in said Court of Appeals, No. 12087, there pending upon appeal from the final amended judgment of a specially constituted three-judge district court for the District of Hawaii, made and entered February 13, 1948.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

Summary

This case involves the validity of a statute of the Territory of Hawaii, Act 104 of the Session Laws of Hawaii 1943, now chapter 31 of the Revised Laws of Hawaii 1945, and is the same case docketed in this Court as No. 52 of this term, upon direct appeal to this Court from the aforesaid final amended judgment of the specially constituted three-judge district court for the District of Hawaii, made and entered February 13, 1948. This Court, by order entered June 1, 1948 in said cause (then No. 787 of the October Term, 1947) after reciting that the jurisdictional statement filed in said cause had been considered, postponed further consideration of the question of the jurisdiction of this Court to the hearing of the case on the merits.

Appellants in said cause (No. 52 of this term), because of grave doubts as to their right of direct appeal to this Court, said doubts having been expressed in the jurisdictional statement heretofore considered by this Court, likewise noted and perfected their appeal to the United States Court of Appeals for the Ninth Circuit. This petition is

filed for the purpose of presenting the request that, in the event this Court does not have jurisdiction on the direct appeal to this Court (No. 52), the cause be brought before this Court by the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, before the rendition of judgment by said Court of Appeals. The appeal necessarily lies in said Court of Appeals if it does not lie in this Court.

The transcript of the record of the cause docketed in the United States Court of Appeals for the Ninth Circuit as No. 12087, duly certified and filed in support of this petition, is identical with the record filed in connection with the direct appeal to this Court, said No. 52. The petitioners have adopted as their specification of errors in said No. 12087 in the Court of Appeals the assignment of errors filed with the petition for direct appeal to this Court. The opinions below, statement as to jurisdiction, statement of the case, and argument, are the same as set forth in the brief filed by these petitioners as the appellants in said No. 52 in this Court. Petitioners hereby adopt as their brief in support of this petition, and as their brief in the event the writ of certiorari prayed for should be granted, the brief filed by them as appellants in said No. 52, and request this Court to consider this petition in conjunction with the direct appeal to this Court (No. 52).

Questions Presented

The questions presented are the same as set forth in the specification of errors in the brief filed by these petitioners as appellants in said No. 52 in this Court, which specification of errors is hereby adopted for the purposes of this petition.

Reasons Relied On for Allowance of Writ

This cause involves important questions, as shown by the brief filed by these petitioners as appellants in No. 52, and the public interest will be promoted by prompt settlement of such questions.

The novelty of the questions as to jurisdiction of the specially constituted three-judge district court of the District of Hawaii, and as to the right of direct appeal to this Court from a court in Hawaii under the law governing the case at the time of the appeal, justified these petitioners, appellants in said No. 52 in this Court and appellants in said No. 12087 in the Court of Appeals for the Ninth Circuit, in taking their appeal to each said court. *Healy* v. *Ratta*, 289 U. S. 701, 292 U. S. 263; *Wilentz* v. *Sovereign Camp*, 306 U. S. 573; *Phillips* v. *United States*, 312 U. S. 246, 254.

This Court having considered the novel jurisdictional questions presented in the jurisdictional statement filed in said No. 52 (then No. 789 of the October Term, 1947), and having postponed further consideration of such questions to the hearing of the case on the merits, and the parties on both sides accordingly having agreed that the case should be held in abeyance in the Court of Appeals, and having proceeded with the case in this Court not only as to the questions of jurisdiction but also as to all aspects of the case, it is respectfully submitted that prompt settlement of the important questions presented by this case can be obtained only by this Court's assuming jurisdiction of the case and disposing of all of the questions involved. Such jurisdiction could be assumed by the issuance of the petition prayed for, in the event this Court should decide that a direct appeal did not lie to this Court from the judgment of the district court, and that accordingly the appeal taken to the Court of Appeals for the Ninth Circuit did lie.

Occasion for the alternative application made to this Court through the taking of a direct appeal and through the presentation of this petition, will not arise again, once the jurisdictional questions are adjudicated by this Court.

Dated at Honolulu, T. H., this 11 day of December, 1948.

INGRAM M. STAINBACK,
Governor of the Territory of Hawaii;
WALTER D. ACKERMAN, JR.,
Attorney General of the Territory of Hawaii, and
W. H. LOPER,
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Petitioners,

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IN THE

Supreme Court of the United States

October Term 1948

No. 474

INGRAM M. STAINBACK, Governor of the Territory of Hawaii, WALTER D. ACKERMAN, JR., Attorney General of the Territory of Hawaii, and W. H. LOPER, Superintendent of Public Instruction of the Territory of Hawaii,

Petitioners,

vs.

MO HOCK KE LOK PO, an eleemosynary corporation, DAI KUNG CHINESE SCHOOL, an eleemosynary corporation; CHUNG SHAN CHINESE SCHOOL ASSOCIATION, an eleemosynary corporation, WAH CHAN THOM, WILFRED CHONG and LEONG NGET CHO,

Respondents.

Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit Before Judgment.

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IN THE

Supreme Court of the United States

October Term 1948

No. .....

INGRAM M. STAINBACK, Governor of the Territory of Hawaii, WALTER D. ACKERMAN, JR., Attorney General of the Territory of Hawaii, and W. H. LOPER, Superintendent of Public Instruction of the Territory of Hawaii,

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MO HOCK KE LOK PO, an eleemosynary corporation, DAI KUNG CHINESE SCHOOL, an eleemosynary corporation, CHUNG SHAN CHINESE SCHOOL ASSOCIATION, an eleemosynary corporation, WAH CHAN THOM, WILFRED CHONG and LEONG NGET CHO,

Respondents.

Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit Before Judgment.

Respondents are in accord with petitioners that this is a proper case for this Court to exercise the power granted by new Title 28 U. S. C., Section 1254(1) to grant certiorari to the Court of Appeals for the Ninth Circuit before judgment.

Though the posture of this case is not identical, it is sufficiently similar to *Ex parte Quirin*, 317 U. S. 1 to warrant this court exercising its jurisdiction to grant certiorari. In the *Quirin* case, applications for leave to file petitions for writs of *habeas corpus* were filed directly in this court after denial by the District Court for the Dis-

trict of Columbia of leave to file the petitions in that Court. The applications were filed before any appeal to the Court of Appeals for the District had been perfected. The applications for leave to file the petitions were set down for argument before this court and while the arguments thereon were preceeding, petitioners perfected their appeals in the Court of Appeals for the District of Columbia and filed petitions for writs of certiorari before judgment. This court exercised its jurisdiction and granted these latter petitions. It decided the cases on the petitions thus granted.

The instant case is strikingly similar. Here, because of the question concerning the three-judge court, petitioners filed their direct appeal pursuant to new Title 28 U. S. C., Sections 1253 and 2101(a). Since this Court felt the question was of sufficient importance to order argument thereon, just as it ordered argument on the applications in the *Quirin* case, it would seem proper that, just as in that case, it grant the petition for the writ of certiorari to the Court of Appeals, where an appeal has been perfected.

Respondents suggest that the instant case comes within Rule 39 of this court and "that the public interest will be promoted by prompt settlement in this court of the questions involved."

As in the *Quirin* case, the same reasons which prompted this Court to set the direct appeal down for argument are equally applicable on the question of granting certiorari before judgment to the Court of Appeals.

In the public interest, the many thousands of children in the Territory of Hawaii whose schooling is being affected by this case should not be required to be delayed

until the matter is first decided in this court on a procedural point and then, perhaps, by the Court of Appeals on the merits and then again by this court on the merits. The years taken out of their lives while this process is going on cannot be replaced. It is in "the greater interests of the public." (*St. Louis K. C. & C. R. Co. v. Wabash R. Co.*, 217 U. S. 247, 251) that the matter be now disposed of by this Court where the case is already pending (*cf. Hicks v. Mercantile Trust Co.*, reported sub. nom. *White v. Mechanics Securities Corp.*, 260 U. S. 283, 299; *Royal Insurance Co. v. United States Shipping Board Merchant Fleet Corp.*, reported sub. nom. *Johnson v. United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320, 324, 325; *Eastern Equities Corporation v. United States*, reported sub. nom. *Graham & Foster v. Goodcell*, 282 U. S. 409, 411, 412, 415, note 2; and *cf. Fetters v. United States ex rel Cunningham*, 283 U. S. 638, 641).

Even aside from the fact that the case is already pending before this court, the matter of the schooling of so many thousands of children would seem to be in and of itself sufficient reason in the public interest for the granting of the petition. (*Cf. Railroad Retirement Board v. Alton Railroad Co.*, 295 U. S. 330, 333, 334, 344; *Carter v. Carter Coal Co.*, 298 U. S. 238, 286; *United States v. Bankers Trust Co.*, reported sub. nom. *Norman v. Baltimore and Ohio R. Co.*, 294 U. S. 240, 243, 295.)

Moreover, the rights of the children of Hawaii and of their parents are not alone at stake in the instant case; equally, though of course indirectly, at issue are the rights of the millions of children and their parents on the mainland of the United States, who may be made the subject

of similar legislation by the various state legislatures, if the Hawaiian Territorial Statute challenged herein is valid.

The briefs *amici*, filed, and to be filed, urging the unconstitutionality of the statute by the American Jewish Congress, the American Civil Liberties Union, the American Veterans Committee, and other organizations concerned with civil liberties, attest, in part, to the concern of many in the issues in this case.

Accordingly, the respondents (appellees in *Stainback v. Bo*, No. 52, Oct. Term, 1948) do not object to the grant of certiorari; but on the contrary, in so far as they may, consent thereto, in order that thus this court may pass upon the merits of the constitutionality of the Hawaiian Statute challenged herein.

Respectfully submitted,

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